

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF MASSACHUSETTS
3
4

5 UNITED STATES OF AMERICA, et al.

6 Plaintiffs,

Civil Action No.
1:21-cv-11558-LTS

7 v.

8 AMERICAN AIRLINES GROUP, INC.,
9 et al.,

10 Defendants.
11

12 BEFORE THE HONORABLE LEO T. SOROKIN, DISTRICT JUDGE
13

14 BENCH TRIAL
Day 17
15

16 Thursday, October 27, 2022
17 9:00 a.m.
18
19

20 John J. Moakley United States Courthouse
21 Courtroom 13
22 One Courthouse Way
Boston, Massachusetts

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P R O C E E D I N G S

(In open court.)

THE DEPUTY CLERK: The United States District Court for the District of Massachusetts is now in session, the Honorable Leo T. Sorokin presiding.

THE COURT: Please be seated.

So I know that by your calculation, we'll be done if we go nonstop from 9:00 to 1:00, and that will conclude all the minutes. And -- but I'm accepting Mr. Wall's representation that we can get it done today. And we have to take at least a ten minute break, both for the court reporter and for me, which means that we're ten minutes short, and we can't go over today.

So we can -- for now, I'm just going to leave it to all of you and figure out, and we'll see, and I'm assuming that like, given what's left, we'll be done and it will be fine. But if need be, my solution would be simply to chop ten minutes out of the schedule, and 55/45, or however the split was, and we do it at 11 o'clock, and that comes out to whatever, six and four minutes, but then it would be done at 1:00, but I'd rather just have you work it out than we have to do that. It seems like that's within reach.

MR. JONES: Your Honor, I don't believe it should be a problem today. I think we should be able to keep with the normal schedule and still finish by 1:00.

1 THE COURT: Finish by 1:00.

2 MR. SCHWED: Yeah, we agree.

3 MR. WALL: Just one quick logistical point or
4 process point.

5 As a result of the decision to receive the expert
6 reports in evidence, we suddenly have to deal with a bunch of
7 related issues. One of them is the sealing of the reports.
8 There's a lot of confidential information. We're really not
9 in a position to deal with that instantaneously.

10 THE COURT: Here's how I was thinking generally
11 about it. Like I think that the things that have -- I'm
12 going to write a decision, right? And the things that have
13 come up in court, and we've talked about in court and shown
14 on the monitors, I'm just going to refer to and not think
15 about.

16 MR. WALL: Right.

17 THE COURT: Things that we've talked about but are
18 sealed in the sense that, like, I saw -- the redacted part
19 matter to some of you, in some way, or things that are just
20 sealed, my thought would be, to the extent along the way you
21 can tell me, well, it can be unsealed and it's no problem.
22 Otherwise, I'll see if I need to rely upon -- I'm just going
23 to write the decision based on the evidence that -- the scope
24 of evidence that I described to you yesterday.

25 MR. WALL: Right. And just for now, could we have

1 those under seal?

2 THE COURT: Yes.

3 MR. WALL: The full reports under seal?

4 THE COURT: Yes, you can keep that under seal now.
5 That's fine.

6 They're already sealed, right?

7 MR. WALL: It's -- they weren't going into
8 evidence, so now they're going into evidence sealed.

9 THE COURT: So the experts are going into evidence
10 sealed, and my thought is if I confront and think my decision
11 has sealed information in it, I'll either, if it seems
12 material, I'll, in some way, give you all the chance to weigh
13 in on that before and make that part of the decision public.
14 I just don't know, like --

15 MR. WALL: Okay.

16 THE COURT: So they're sealed for now and then
17 we'll just sort of see what's relied upon in the decision.

18 Because I'm not viewing them, like I said
19 yesterday, as completely in evidence, just, like some
20 document, an e-mail, one page e-mail that was put up on the
21 screen.

22 MR. WALL: Right.

23 THE COURT: Because maybe it isn't cited and
24 referred to, a whole portion. I'm not sure why then.

25 MR. WALL: Understood. That's fine. I think the

1 related issue, less important is just clarification, which I
2 don't think there's any dispute about, there are hundreds, if
3 not thousands of other documents that are cited within the
4 expert reports, and in receiving -- we're assuming that they
5 receiving the expert reports in evidence just --

6 THE COURT: It doesn't pull all of them --

7 MR. WALL: Right.

8 THE COURT: No.

9 MR. WALL: Okay. Great. Thank you.

10 THE COURT: Anymore than that's just the basis.
11 Right? Okay. Go ahead.

12 **ROBERT TOWN, Ph.D.**

13 having been previously duly sworn, testified as follows:

14 **CROSS-EXAMINATION BY COUNSEL FOR DEFENDANT JETBLUE, Continued**

15 BY MR. SCHWED:

16 **Q.** Good morning, Dr. Town.

17 **A.** Good morning.

18 **Q.** Can you open up your -- the binder that's in front of
19 you. And you'll see -- that one, yes. And you'll see in the
20 front pocket there there's a -- something marked DX-1088.
21 You can pull it out if you like, and it's entitled "What Can
22 We Learn From Merger Retrospectives: Lessons From the Airline
23 Industry."

24 Do you see that?

25 **A.** I do see that.

1 **Q.** Is that the draft paper we've been talking about over the
2 last day or -- and your prior testimony?

3 **A.** That is a version of it.

4 **Q.** Do you know if it's the most recent version?

5 **A.** I don't know, because there's two other co-authors, and
6 so they can compile it and send it out, you know, without my
7 knowledge, and so I don't know if this is the last version or
8 not.

9 **Q.** Are you aware of a more recent version?

10 **A.** I am not.

11 MR. SCHWED: Your Honor, we move to admit DX-1088.
12 We understand that the plaintiffs don't have an objection, as
13 long as it's not offered for the truth of the matter.

14 MR. HEIPP: That's correct, Your Honor, on that
15 understanding, no objection.

16 THE COURT: All right. I'll take it in that --
17 with that limitation. Admitted as DX-1088.

18 (Defendants' Exhibit No. DX-1088 admitted into
19 evidence.)

20 BY MR. SCHWED:

21 **Q.** Can you -- do you have your slide deck in front of you?
22 I think it's maybe the smallest notebook up there. And we
23 can also put up slide 19 on the screen, if that's easier?

24 **A.** That's probably easier, yeah.

25 **Q.** And this is one of the slides you showed yesterday? Do

1 you recall this?

2 **A.** I do.

3 **Q.** Just to be clear that I'm reading it right, this shows a
4 net increase of 13 percent LaGuardia seats due to the NEA,
5 correct?

6 **A.** Due to the slot -- slot and JetBlue -- I mean, there's a
7 couple components to it. There's the JetBlue has got the
8 up-gauging A220s, and so that's part of the preNEA order
9 book, so it's a little bit of both. Part of it is the slot
10 swap and part of it is due to the existing order book.

11 **Q.** Are these actual or predicted numbers?

12 **A.** These are from Raven.

13 **Q.** Okay. And you would recall that Mr. Friedman testified
14 that daily peak seats at LaGuardia actually are up 20 percent
15 from 2019. Do you recall that?

16 **A.** I don't recall that, but I don't have a reason to think
17 it's -- he didn't say that.

18 **Q.** Those increase in -- in seats are a good thing for
19 consumers, correct?

20 **A.** It depends. It depends where they are coming in and I
21 think there's been discussion here that, about, I think
22 Mr. -- Dr. Israel made this point that those planes were
23 coming from somewhere, so you have to net out kind of where
24 everything is coming from.

25 **Q.** But looking at the New York market or the Northeast

1 Alliance markets, that those -- that's a good thing, correct?

2 **A.** It could be a beneficial to those consumers.

3 **Q.** Could we turn to slide 33 of your opening deck from
4 yesterday.

5 In this slide, you're criticizing the time periods
6 that Dr. Israel used to show capacity share changes?

7 **A.** Yeah. It speaks for itself.

8 **Q.** And then, in fact, your headline says they're misleading,
9 correct?

10 **A.** They are.

11 **Q.** Just so I understand exactly what's been shown here, the
12 green line that you have here represents the preNEA period?

13 **A.** That Dr. Israel used.

14 **Q.** Right. And this includes roughly the last nine months
15 before COVID?

16 **A.** Approximately, yeah.

17 **Q.** And the red line represents the -- what you might call
18 the postNEA period?

19 **A.** It's in the postNEA period.

20 **Q.** And that's the first nine months after the implementation
21 of the NEA, roughly?

22 **A.** Approximately.

23 **Q.** Both time periods are March through December?

24 **A.** They are.

25 **Q.** And it's important if you're comparing two different

1 years, for example, to try to -- if you can, keep the months
2 the same to avoid seasonal differences?

3 **A.** Yes, that's true.

4 **Q.** And just so I understand how this chart works, the red
5 line is about eight points higher than the green line?

6 **A.** Approximately.

7 **Q.** And even if you looked at the lowest point after NEA
8 implementation, it is several points above the highest point
9 preNEA, isn't it?

10 **A.** I would say it's about three points higher.

11 **Q.** And the lowest point there would be -- would include the
12 period of time when there were operational issues, correct?

13 **A.** I'm sorry, could you repeat the question?

14 **Q.** The lowest points on the postNEA period would include the
15 last several months when JetBlue is dealing with operational
16 issues, correct?

17 **A.** There may have been operational issues throughout because
18 of COVID, which I think there was testimony that that was
19 wrecking havoc throughout the airline industry, but there was
20 also testimony on that point, too.

21 **Q.** But you've also heard testimony specifically about
22 operational issues that have caused JetBlue and potentially
23 others to pull down service in the second half of 2022,
24 correct?

25 **A.** I have heard testimony on that.

1 **Q.** You don't have any reason to dispute that testimony,
2 correct?

3 **A.** No.

4 **Q.** Now, can you turn to slide 35, please. This is a similar
5 chart, but not limited to the Northeast Alliance. Is that
6 fair?

7 **A.** That is fair.

8 **Q.** The blue line is actually the same line, I believe, as in
9 slide 33.

10 **A.** Yes, it is.

11 **Q.** The black line is all airports, including those outside
12 the Northeast Alliance.

13 **A.** That is correct.

14 **Q.** And once again, the postNEA shares are well above the
15 preNEA shares for just about the entire period, correct?

16 **A.** On the black line?

17 **Q.** Yes.

18 **A.** I think they're pretty close to even, if you compare
19 March to -- or you know, the latest data point. They're
20 pretty similar.

21 **Q.** I'm sorry, can you say that again? If you compare what
22 to what?

23 **A.** If you compare like December 2017 to what is November of
24 this year, they're pretty similar. I mean, you'd have to
25 look pretty closely to see a difference.

1 **Q.** So if you could -- other than, say, the last four months
2 of this chart, when JetBlue had operational issues, the black
3 line is above every period of time in the post -- withdrawn.

4 Other than the most recent period of time, the last
5 few months, when JetBlue has had operational issues, the
6 black line in the postNEA is above the black line in every --
7 for the entire preNEA period, correct?

8 **A.** If you lop off the part where it's declining, that is
9 true.

10 **Q.** And again, those -- you don't have any reason to dispute
11 that the decline --

12 THE COURT: Is it really just higher the whole
13 time? Maybe I'm misreading the chart.

14 MR. SCHWED: I think it is, Your Honor, and if you
15 take any point in time -- and I'll ask it as a question to
16 the witness, maybe.

17 BY MR. SCHWED:

18 **Q.** If you take any point in time, let's say, before June of
19 2022 and compare it to any point in time before -- in 2019 or
20 earlier, I believe the black line is higher; is that correct,
21 Dr. Town?

22 **A.** From June, you know, going backward?

23 **Q.** Yes.

24 **A.** Yes, I think at the end, it's pretty similar.

25 **Q.** Using the last, say December to September, it's pretty

1 similar?

2 **A.** Pretty similar to December -- well, I'd have to look.

3 THE COURT: Well, can you compare December 2017 to
4 September -- in other words, is it -- like is it a fair
5 compare to compare December to September?

6 **A.** You probably want to compare the same months.

7 **Q.** I mean, just as a layperson, would you agree with me that
8 in December there might be a peak in travel because of the
9 holidays?

10 THE WITNESS: Oh, yeah. That's true.

11 THE COURT: And wouldn't there, in September, be a
12 dip?

13 THE WITNESS: That is true. However, if you just
14 compare.

15 THE COURT: And would that suggest that September
16 is a bad comparison or a fair comparison to December, in any
17 given year?

18 THE WITNESS: I think it's neither. It's probably
19 not the best comparison, but if you compared, you know,
20 October to October, they're close. You know, it's maybe a
21 little bit above in October of 2022, but it's not a lot
22 above.

23 THE COURT: I see. Okay.

24 BY MR. SCHWED:

25 **Q.** Just to put a finer point on that line of questioning,

1 September of 2022 is higher than September 2019, correct? On
2 the black line?

3 **A.** Yeah, I think that's true.

4 **Q.** And even December of 2022 is higher than December of
5 2019. Maybe not a lot higher, but a bit higher.

6 **A.** Did you say December?

7 **Q.** December of 2022 is higher than December of 2019, maybe
8 not a lot, but by a little.

9 **A.** I don't think December is made -- is in the data.

10 **Q.** Oh, is that November?

11 **A.** Yeah, it ends in November.

12 **Q.** Okay. And November is higher than November -- let me ask
13 you a better question. November of 2022 is higher than
14 November of 2019?

15 THE COURT: How can there be data for November of
16 2022.

17 MR. SCHWED: I'll let the witness answer.

18 THE WITNESS: This is from OAG data and it has the
19 schedules going out, so this is the schedules that are
20 anticipated to fly in --

21 THE COURT: So this would be -- this would be based
22 on schedule data, not actual passenger data for November of
23 2022.

24 THE WITNESS: That's right, most of the data.

25 THE COURT: In fact, most of this is --

1 THE WITNESS: That's correct.

2 THE COURT: Okay.

3 THE WITNESS: I'm sorry. Can you ask the question
4 again?

5 BY MR. SCHWED:

6 Q. So December, even -- I'll move on, I think the chart
7 speaks for itself.

8 And just to understand, you don't have any reason
9 to dispute the testimony that the operational issues that
10 we've heard about are temporary, do you?

11 A. I don't have a reason to doubt that.

12 Q. Now can we turn to slides 38 and 39 from yesterday?
13 These slides, you compare Dr. Israel's predicted growth,
14 based on the Raven output with his actual growth predictions,
15 correct?

16 A. That is correct.

17 Q. This was done on a route by route basis?

18 A. Yes.

19 Q. Are you aware that Raven calculates passengers and shares
20 on a different route basis than Dr. Israel used for actual
21 growth?

22 A. I'm sorry, can you --

23 Q. Yeah. Are you aware that Raven calculates passengers and
24 shares on a different route basis than Dr. Israel used for
25 actual growth?

1 **A.** I'd have to go back and look at that, so I don't know if
2 that's true or not true.

3 **Q.** So do you recall that Raven calculates shares on what's
4 referred to as an O&D, origination and destination basis?

5 **A.** That's my understanding, yes.

6 **Q.** And Dr. Israel used segment basis?

7 **A.** That is my understanding.

8 **Q.** So, for example, if you took an itinerary, say
9 Jacksonville-JFK-Paris, are you with me?

10 **A.** Yeah.

11 **Q.** Raven would use the pairs at Jacksonville-Paris, correct?

12 **A.** Correct.

13 **Q.** And Dr. Israel would actually be looking at two different
14 segments, Jacksonville-JFK and Jacksonville -- JFK-Paris,
15 right?

16 **A.** That may be true. I would have to dig into it, but they
17 still should be correlated, you would think.

18 **Q.** But you would agree with me that, if that is the case,
19 one might say that your comparing segments to O&Ds is not an,
20 as you might say, an apples to apples comparison?

21 **A.** I don't -- I don't agree with that.

22 **Q.** And another reason the results could be different is
23 that, under Raven, everything besides American's and
24 JetBlue's schedule was held constant. That's the way Raven
25 works, right?

1 **A.** That is the way Raven works.

2 **Q.** And that would include, for example, competitor
3 schedules.

4 **A.** Yeah, I should say that's not how -- the schedule that
5 was inputted into Raven made that assumption.

6 **Q.** And in the real world, competitors can change or add
7 routes and schedules, correct?

8 **A.** Yes.

9 **Q.** For example, since the NEA, Delta and United have added
10 flights at NEA airports?

11 **A.** I'd have to look.

12 **Q.** Do you recall hearing testimony about that?

13 **A.** I do recall.

14 **Q.** And those types of schedule changes, which were not
15 accounted for in Raven, would affect American and JetBlue
16 shares in the actual postNEA data, right?

17 **A.** That is true.

18 **Q.** Now, let's turn to the -- briefly to capacity discipline.
19 You said you addressed the legacy airlines bankruptcies by
20 adding annual indicators for bankruptcy?

21 **A.** Annual indicators from the period 2000 onwards.

22 **Q.** And just so I understand it, those annual -- for example,
23 if you have -- United and US Airways both declared bankruptcy
24 in 2002?

25 **A.** That's correct.

1 Q. So you would have added an annual indicator for 2002?

2 A. 2002 is one of the -- yes, one of the annual indicators.

3 Q. But the annual indicator for an airline's bankruptcy
4 would end when that airline came out of bankruptcy?

5 A. No, it's for every year. That's its own separate
6 indicator.

7 Q. You didn't have an annual indicator addressing financial
8 performance when an airline was not in bankruptcy, correct?

9 A. It's an annual indicator that would pick up any deviation
10 from the historical relationship between GDP, fuel prices,
11 and ASMs, that would be driven by what you're suggesting.

12 Q. But if, for example, are you aware that, between the time
13 that you exited bankruptcy and start the alleged capacity
14 period, United lost two and a half billion dollars?

15 A. I am aware they lost a lot of money during that period.
16 But if that was affecting their capacity decisions and that
17 was materially impacting industry capacity, then it would
18 show up as a gap in my analysis.

19 Q. And, in fact, of the 2 and a half billion, 1.9 billion
20 was lost in 2008?

21 A. That may be true. I don't know specifically.

22 Q. And you would agree with me that after losing
23 \$1.9 billion in 2008, United might have decided to change its
24 approach to capacity to try to turn things around?

25 A. It could have.

1 Q. And it could have done so unilaterally?

2 A. It could have. I think the evidence suggests that there
3 was capacity discipline involved.

4 Q. Now, you've also argued -- you've criticized Dr. Lee's
5 inclusion of load factor and LCC-RPM share and regressions as
6 endogenous, correct?

7 A. That is correct.

8 Q. And he testified that he tested for endogeneity by using
9 instrumental variables?

10 A. I think that's roughly what he said.

11 Q. And you do agree that instrumental variable regression is
12 a standard econometric method used to address endogeneity,
13 right?

14 A. It is used to address endogeneity, but it's not a fix.
15 You have to have -- there are very specific criteria that
16 need to be met. Your instrumental variable has to meet those
17 criteria, and if it doesn't, then your approach is invalid,
18 would yield biased estimates. And there's a -- economists
19 worry about this issue a lot. They -- you know, if you're
20 doing an instrumental variable.

21 Q. Dr. Town, I don't mean to interrupt, I just asked if it
22 was a standard method. That was the question.

23 A. It's used quite frequently, but there are specific
24 requirements for it to yield accurate estimates.

25 Q. One way to test the instrumental variables is called a

1 weak instrument test?

2 **A.** That's one -- there are two criteria that the variables
3 need to meet and that will test for one of them.

4 **Q.** And do you agree that Dr. Lee used -- when he used the
5 instrumental variable regression, he found that his
6 instrument passed the weak instrument test, correct?

7 **A.** It did and that's not surprising in a time series
8 context.

9 **Q.** And just to understand, the difference between you and
10 Dr. Lee -- well, withdrawn.

11 Let's just assume for the moment that you are right
12 about capacity -- that your regression is right. And I want
13 to understand, just to make sure we understand we're all on
14 the same pages to the limits of what it does, what it does
15 show is that, in 2009, aggregate legacy capacity began to
16 deviate from what you predicted?

17 **A.** I'm sorry. Can you repeat that?

18 **Q.** Yeah, your regression shows, if it's correct, that in
19 around 2009, aggregate legacy capacity began to deviate from
20 predicted aggregate capacity?

21 **A.** I think that's correct.

22 **Q.** And it doesn't -- your regression itself does not show
23 why capacity began to deviate, correct?

24 **A.** It does not, in and of itself. You need more --

25 **Q.** Yeah, and your regression does not identify why capacity

1 returned to predicted levels around 2018, correct?

2 **A.** It doesn't explain why, no.

3 **Q.** And you have no opinion on what might need to change in
4 the market for capacity discipline to return, right?

5 **A.** I don't know that I'd say no opinion. I think I can
6 identify factors that might influence it, but I can't point
7 to a specific causal lever.

8 **Q.** You don't have a set of criteria, for example, that
9 you've identified, ex-ante. To predict if capacity
10 discipline might return. In other words, my regression
11 showed that if X, Y, and Z happened, that's going to cause
12 capacity discipline. You don't have that, right?

13 **A.** I agree with that.

14 **Q.** And you've done no quantitative or econometric analysis
15 showing that the NEA will increase the risk of capacity
16 discipline returning?

17 **A.** I have not quantified that, but I relied on the evidence
18 that JetBlue is a maverick, and now coordinating capacity
19 with American.

20 **Q.** And you've also heard the evidence that JetBlue will
21 continue to be a maverick, correct?

22 **A.** I've heard that testimony.

23 **Q.** Can we turn to slide 41. And your opinion is that the
24 defendants overstate the importance of the DOT commitments,
25 correct?

1 **A.** That is correct.

2 **Q.** It's not your opinion that the commitments have no value,
3 correct?

4 **A.** I did not claim that, no.

5 **Q.** And the commitments you discuss on these pages, this one
6 and the next one, are only the growth commitments, right?

7 **A.** I'm sorry, can you ask that?

8 **Q.** Yeah, you only are discussing the growth commitments on
9 these pages?

10 **A.** Yes, that is.

11 **Q.** And you are aware that there are other commitments in the
12 DOT agreement, correct?

13 **A.** I believe they are, yes.

14 **Q.** Limits on JetBlue's ability to exit certain routes?

15 **A.** I believe that's true.

16 **Q.** Limits on what the parties can discuss?

17 **A.** I believe that's true.

18 **Q.** Recordkeeping requirements?

19 **A.** I believe that's true.

20 **Q.** Reporting requirements.

21 **A.** I believe that's true.

22 **Q.** And the DOT retains the ability to monitor American's and
23 JetBlue's behavior at all four airports going forward, right?

24 **A.** I believe they have regulatory oversight in that regard.

25 **Q.** And the second bullet here, the one that says the DOT

1 baseline, that takes issue with the baseline for measuring
2 the growth commitments?

3 **A.** It takes -- it just states that. It doesn't include this
4 planned growth.

5 **Q.** Are you -- is it your view, are you opining that the DOT
6 somehow made an error in its judgement as to what to do for
7 the baseline?

8 **A.** No. I'm just saying that the defendants are overstating
9 the importance of those commitments.

10 **Q.** Now, let's turn a little bit to what -- to slide 43, if
11 we can. And your first bullet refers to a comparison of the
12 codesharing aspects of the Northeast Alliance and the
13 codesharing aspect of the WCIA, correct?

14 **A.** That is correct.

15 **Q.** It does not involve a comparison of the entire WCIA to
16 the entire Northeast Alliance, correct?

17 **A.** It does not.

18 **Q.** And you recognize that the benefits of the entire
19 Northeast Alliance are much greater than the benefits of
20 codesharing alone, correct?

21 **A.** Insofar as capacity is driving -- if that's what you're
22 asking, I think it's about capacity that's driving the
23 implied growth from the NEA that's, you know, done in the
24 Raven runs.

25 **Q.** And codesharing is a small part of the capacity growth

1 within the Northeast Alliance?

2 **A.** That is what the Raven runs indicate.

3 **Q.** And in fact, American analyzed the codesharing alone
4 relationship before entering the Northeast Alliance, correct?

5 **A.** That is my understanding.

6 **Q.** And it concluded that it doesn't allow American to truly
7 create optimal customer value?

8 **A.** I don't know about that exact quote.

9 **Q.** Does it sound right to you?

10 **A.** It wouldn't surprise me.

11 MR. SCHWED: Andy, would you call up PX-279 and
12 slide 6.

13 It's in your book, but it may be easier to look
14 here.

15 BY MR. SCHWED:

16 **Q.** You don't have -- you see the headline there,
17 "partnership with codeshare only doesn't allow us to truly
18 create optimum customer value." You don't disagree with that
19 that that was American's analysis at the time, do you?

20 **A.** I agree that they said it on this slide, yes.

21 **Q.** Okay. And then if you look at the last bullet point in
22 bold, it says, "Codeshare alone does not maximize customer
23 connectivity, nor does it provide the most compelling
24 schedule offering required to be competitive with Delta and
25 United." You don't disagree with that assessment, do you?

1 **A.** I agree that they wrote that here.

2 **Q.** And JetBlue also analyzed the codesharing alone
3 relationship, and concluded that it didn't create the same
4 benefits as the NEA, right?

5 **A.** They may have. I don't recall it directly.

6 **Q.** Codesharing alone would not involve the replacement of
7 American's smaller planes with JetBlue's bigger ones, right?

8 **A.** No, it wouldn't.

9 **Q.** Codesharing alone would not involve any benefits of
10 improved schedules, right?

11 **A.** No, it wouldn't, but it doesn't necessarily preclude it,
12 but alone, no.

13 **Q.** Well, it wouldn't allow the parties to work together to
14 improve the schedules. They'd have to just operate
15 independently and guess what the other is doing, right?

16 **A.** It will -- unless their -- that's true, if it's only
17 codeshare, I would agree with that.

18 **Q.** And you have not done any analysis to refute the
19 conclusion that both airlines came to regarding codesharing,
20 right?

21 **A.** No, I would point out, I think there was some testimony
22 about the WCIA that mentioned -- there's no -- they did
23 codesharing.

24 **Q.** I'm just asking -- I'm very short on time, did you do any
25 analysis?

1 **A.** I did not do any specific analysis.

2 **Q.** Thank you. You also offered the opinion that American
3 and JetBlue could enter an arrangement like the WCIA, right?

4 **A.** They considered it.

5 **Q.** And you have not done any analysis of the benefits that
6 would have been generated from JetBlue and American entering
7 that type of relationship, correct?

8 **A.** That is correct. I testified to that on my direct.

9 **Q.** And you actually said you couldn't do such a comparison,
10 because you don't have a network planning department,
11 correct?

12 **A.** I believe that's what I said.

13 **Q.** Are you aware that there are vendors that provide
14 services like that, such as ABG Sea Berry.

15 **A.** Sea Berry works with JetBlue, and so I think that would
16 be good work with them, and so -- but the key part of that
17 analysis is the schedule and --

18 **Q.** Can you just answer the question?

19 **A.** I am trying to answer.

20 MR. HEIPP: He is trying to answer the question.

21 BY MR. SCHWED:

22 **Q.** My question was whether you were aware of the vendor?

23 **A.** I am.

24 **Q.** That was the question and you didn't contact that vendor.

25 THE COURT: I think the thing that would help is,

1 as a witness, you're not the only person who's experienced
2 this, but the thing about being a witness is you don't get to
3 give a soliloquy, you don't get to teach the class, you don't
4 get to speak whatever you want. All you get to do is answer
5 the precise question he asks. And that there may be an
6 explanation that means that the point he's making maybe is
7 dumb, maybe it's brilliant. But to the extent that you think
8 it's dumb or there's an explanation, you don't get to say it.
9 You're stuck with the point, and that you have an army over
10 here, just like there's an army over there, and if they think
11 it's a dumb point or that there's an answer to it, they will
12 ask that -- tell us why. And it will require -- and
13 that's --

14 And so it's particularly because they're all time
15 limited and they're running out of time, like at the end of
16 the basketball game, right, and so you need to just answer
17 the precise question.

18 So now whatever the question is, Mr. Schwed,
19 because I know that I don't remember it anymore, so I doubt
20 anybody else does.

21 BY MR. SCHWED:

22 **Q.** So just so you're clear, you're aware that there's
23 vendors that provides these kind of services?

24 **A.** I am aware.

25 **Q.** You did not attempt to contact any such vendor to see if

1 they'd work with you?

2 **A.** In this matter, that's correct.

3 **Q.** And American, in fact, did analyze a WCIA-like
4 arrangement with JetBlue, correct?

5 **A.** That is my understanding. Yes.

6 **Q.** And as with -- its determination of codesharing, you
7 concluded that the Northeast Alliance would be better for
8 consumers, correct?

9 **A.** I'm not sure that they -- they said it created more
10 value, I'm not sure if that translated into consumer benefit.

11 **Q.** The WCIA would not create the value of network
12 optimization or schedule coordination, correct?

13 **A.** The value that calculated was less than.

14 **Q.** But I'm just saying, just in concept, the WCIA, applying
15 the WCIA between JetBlue and American would not allow network
16 optimization or schedule coordination, correct?

17 **A.** That is likely the case.

18 **Q.** And you're aware that those are the very features that
19 led to the growth that was presented to the American board in
20 the slide I believe Mr. Raja referred to as the eureka slide.
21 Do you recall that?

22 **A.** I'm sorry. Can you --

23 **Q.** Yeah, the schedule optimization and coordination are
24 actually the features that led to the -- much of the growth
25 that was in the eureka slide that Mr. Raja testified about

1 that was presented to the board, right?

2 **A.** I would have to review that, but I'll take your word for
3 that.

4 **Q.** Okay. And you have no evidence to show that an
5 arrangement like the WCIA was ever presented to JetBlue?

6 **A.** I'd have to -- I don't recall any at this moment.

7 **Q.** You have not assessed whether a WCIA-like arrangement
8 would have made financial sense for JetBlue, correct?

9 **A.** No, I have not made that assessment.

10 **Q.** You have not assessed the benefits of American doing a
11 similar arrangement with JetBlue, correct?

12 **A.** I have not done the financial analysis of those, no.

13 **Q.** And just speaking more broadly, Dr. Town, you have not
14 calculated the benefits associated with any so-called less
15 restrictive alternative, correct?

16 **A.** That is correct, as I testified earlier, yes.

17 **Q.** And you have not offered the opinion that any so-called
18 less restrictive alternative achieved substantially the same
19 benefits as the Northeast Alliance, correct?

20 **A.** I have not quantified it.

21 **Q.** But you're not -- just -- I'm just asking this question.
22 You have not offered the opinion that any so-called less
23 restrictive alternative achieved substantially the same
24 benefits as the Northeast Alliance. Isn't that correct?

25 **A.** I don't think I -- I think I say something different in

1 my report than you're suggesting.

2 **Q.** You're offering the opinion that it -- you've calculated
3 that it achieves substantially the same benefits as the
4 Northeast Alliance?

5 **A.** No, I have not quantified it.

6 MR. SCHWED: Thank you. No further questions.

7 THE COURT: All right. Any redirect?

8 MR. HEIPP: Thank you, Your Honor.

9 **REDIRECT EXAMINATION BY COUNSEL FOR PLAINTIFF USA**

10 BY MR. HEIPP:

11 **Q.** Just a few questions for you, Dr. Town. You were asked a
12 number of questions yesterday about whether Dr. Israel's
13 consumer benefits calculation approximates what would be
14 derived using a logit demand curve? Do you remember those
15 calculations?

16 **A.** I do.

17 **Q.** Can you remind us what kind of a demand curve Dr. Israel
18 did use?

19 **A.** He used a linear demand curve.

20 **Q.** Is excluding part of the benefits using linear demand an
21 accurate approximation of the benefits from using logit
22 demand?

23 **A.** No.

24 **Q.** And regardless of what kind of a demand curve that you
25 choose under Dr. Israel's methodology, would you get any

1 benefits if there's no assumed increase in capacity?

2 **A.** That's correct. You would not get benefits unless
3 there's increases in capacity.

4 **Q.** And relatedly, you were asked a few questions about
5 JetBlue's stand-alone growth plans. Do you remember those
6 questions?

7 **A.** I do.

8 **Q.** What did Dr. Israel's analysis assume about JetBlue's
9 growth plans going forward?

10 **A.** He assumed that there would be no growth for JetBlue
11 going forward.

12 **Q.** Yesterday Mr. Schwed asked you a number of questions
13 about the draft working paper about the American/US Airways
14 merger, and it was moved into evidence this morning. Do you
15 remember those questions?

16 **A.** I do.

17 **Q.** Why did you put that paper on hold?

18 **A.** Because there's a lot of flaws in how you would identify
19 the impact of the merger. And in this retrospective there is
20 some flaws. There is -- particularly, there is the control
21 group is contaminated, there's issues with the treatment
22 group insofar as there's this -- the Wright Amendment
23 problems. So there's a lot of problems with applying the
24 difference in difference approach to this -- in this setting.
25 And we need to figure out those solutions before we can go

1 forward.

2 **Q.** Do you recall, actually in the draft paper, pointing out
3 some of those problems with the control group?

4 **A.** Yes, I believe so.

5 **Q.** Do you recall what the paper preliminarily concluded
6 about the American/US Airways merger, if you accounted for
7 the divestitures?

8 **A.** I think if you counted for divestitures, my recollection
9 is that it did not increase passengers, but I'd have to
10 review it. It's a little murky.

11 **Q.** Yeah. Actually, if you want to take a quick look at it,
12 do you have it there? I'm not sure it was handed out to you
13 or not, but we can give you a copy.

14 **A.** Where did it go? Oh, here it is.

15 **Q.** If you want to just quickly take a look, and I won't have
16 you read it out loud, but just to refresh your recollection.

17 MR. HEIPP: And if we can just take it down from
18 the screen, actually.

19 THE COURT: Which part do you want him to read?

20 MR. HEIPP: If you look at -- it's the bottom of
21 page 5, it's page 5 of the internal pages, bottom of --

22 BY MR. HEIPP:

23 **Q.** There's a paragraph that starts, "There is also a large
24 literature." Do you see that?

25 **A.** Yeah.

1 **Q.** If you look at the end of that paragraph, on the next
2 page?

3 **A.** Yeah.

4 **Q.** And if you can just read the last couple of sentences to
5 yourself.

6 **A.** Yes, I've read that.

7 **Q.** Does that refresh your recollection about what these
8 preliminary results concluded, if you accounted for the
9 divestitures?

10 **A.** Yeah. They point to a different interpretation of the
11 impact of these mergers.

12 **Q.** Different interpretation than what the Carlton and Israel
13 paper concluded?

14 **A.** Correct.

15 **Q.** Okay. You can put that to the side. Thank you.

16 Just a moment ago, you were asked about third party
17 vendors that provide services related to network planning.
18 Do you remember those questions?

19 **A.** I do.

20 **Q.** I imagine you do. Do those vendors, to your knowledge,
21 create entire airline network schedules?

22 **A.** To my knowledge, I don't know if they do or not. But
23 it -- it wouldn't surprise me if they don't.

24 **Q.** Does American and JetBlue have network planning
25 departments, despite the existence of those third party

1 vendors?

2 **A.** They do.

3 **Q.** Okay. Just one last set of questions, Dr. Town. You
4 were asked yesterday about American and JetBlue's growth
5 relative to other airlines and whether you had looked at how
6 the two had funded growth across their networks. Do you
7 recall that?

8 **A.** I do.

9 MR. HEIPP: Could we put up slide 37 from your
10 demonstratives.

11 BY MR. HEIPP:

12 **Q.** Can you remind us what this graph is, Dr. Town?

13 **A.** Yeah, this is the graph of the percentage change in
14 capacity for American/JetBlue combined, Delta and United from
15 2017, up to November or October of this year.

16 **Q.** Under the defendants in Dr. Israel's theory that the NEA
17 has led to an increase in capacity, what would you expect
18 this graph to show?

19 **A.** I would expect the blue line to be above the green and
20 red lines.

21 **Q.** And what does it actually show?

22 **A.** It shows that it's below -- it's in between, it's below
23 United and above Delta.

24 MR. DERITA: Thank you, Dr. Town, no further
25 questions, Your Honor.

1 MR. SCHWED: Just a few.

2 **RE-CROSS-EXAMINATION BY COUNSEL FOR DEFENDANT JETBLUE**

3 BY MR. SCHWED:

4 Q. If you leave this slide up, slide 37, it shows that until
5 JetBlue started having operational difficulties, in fact, the
6 blue line was above the other lines, correct?

7 A. Until -- it was above until June.

8 Q. Yeah, and that's when JetBlue started pulling down
9 capacity to address its operational issues, correct?

10 A. I'd have to review that testimony, but --

11 Q. And then if you could just look at your -- your article
12 that you were shown before?

13 A. Yeah.

14 Q. And turn to page 4. Just at the bottom of the second
15 paragraph, you are saying -- you're talking about the
16 United/US Air merger, and it says, "This suggests that the
17 merger was consumer welfare enhancing," right?

18 A. I'm sorry, can you --

19 Q. Yeah, the bottom of the second paragraph of page 4?

20 A. I think we're not on the same page.

21 Q. Of your article, page 4?

22 A. I got -- oh, yes. I'm with you.

23 Q. "This suggests that the merger was consumer welfare
24 enhancing."

25 Do you see that?

1 **A.** I do.

2 **Q.** And that merger that that's talking about is the
3 United -- the US Air/American merger, correct?

4 **A.** It is referring to that.

5 **Q.** And if you turn to page 32 and if you look at the
6 paragraph that begins, "While," do you see that?

7 **A.** I do.

8 **Q.** The third -- at the end of the second line, "Divestiture
9 market fares decreased 6.6 percent, with no differential
10 impact and presumption markets. Total traffic increased by a
11 substantial 16.5 percent in divestiture markets with little
12 evidence of a differential impact for presumptive markets."

13 Do you see that?

14 **A.** I do.

15 **Q.** And by the way, divestiture markets as you defined them
16 in this paper, included any route that touched any airport
17 where there was any divestiture, right?

18 **A.** I think that's correct.

19 **Q.** So for example, the entire -- and by the way, in that
20 paper, you defined the New York City market to include all --
21 all three New York airports, right?

22 **A.** It's an observation. Market -- it's an observation.
23 They're grouped together in this analysis.

24 **Q.** But that's how you looked at it in this paper. You
25 looked at New York City market as all three airports,

1 correct?

2 **A.** Yeah, to be conservative, that's why we did it.

3 **Q.** And just to clarify my prior question, you defined a
4 divestiture market as one where any city there was a
5 divestiture, correct?

6 **A.** I believe that's true.

7 **Q.** So in your analysis that showed increased traffic,
8 decreased fares, the entire New York market in the NEA would
9 be considered a divestiture market, just like it was in this
10 paper, right?

11 **A.** Well, that's a -- are you taking an antitrust market or
12 the market we're using?

13 **Q.** The market the way you did this analysis?

14 **A.** Well, they're grouped in this analysis.

15 MR. SCHWED: Nothing further.

16 THE COURT: All right. Thank you very much.
17 You're excused.

18 Next witness?

19 MR. JONES: Your Honor, the plaintiffs call
20 Dr. Miller, and my colleague, Mr. Derita will be handling the
21 examination.

22 THE COURT: Okay.

23 (The witness was duly sworn.)

24 MR. DERITA: Good morning, Your Honor.

25 THE COURT: Good morning.

1 MR. DERITA: We have some demonstratives that
2 Dr. Miller has prepared and we're going to publish those to
3 the gallery.

4 THE COURT: Go right ahead.

5 **NATHAN H. MILLER, Ph.D.**

6 having been duly sworn, testified as follows:

7 **DIRECT EXAMINATION BY COUNSEL FOR PLAINTIFF USA**

8 BY MR. DERITA:

9 **Q.** Dr. Miller, I assume you've heard testimony from
10 defendants' experts that critiqued your testimony and your
11 reports.

12 What's your reaction to that testimony?

13 **A.** Well, I've read it. I've analyzed them. I've determined
14 that the defendants' economist experts' critiques of my
15 analysis are flawed, and so I still think what I think, which
16 is that the NEA effectively eliminates competition between
17 American and JetBlue. It gives them incentives to increase
18 price and reduce output, especially in these -- in overlap
19 markets, especially in the nonstop overlap markets.

20 **Q.** I want to talk about why your conclusions haven't
21 changed, and we'll start with Boston.

22 Did you hear any testimony from defendants that
23 change your prediction that the NEA would lead to harm there?

24 **A.** I have not. And with respect to market definition
25 itself, I just think it's relevant to note that the treatment

1 of Boston as a unique endpoint for the purposes of market
2 definition does not appear to be contested by the other
3 side's economist. The loss of competition in Boston alone is
4 substantial, and given the results that I -- that I obtained,
5 I get a 428 million of overcharge, just on the Boston routes.

6 **Q.** So there's been a -- some testimony about whether Newark
7 is in the same market as JFK and LaGuardia. What's your
8 reaction to that?

9 **A.** My first reaction is that, in terms of the economics and
10 the magnitude of the effect, it's not that important. You
11 lose -- you know, if you were to run the whole analysis
12 including Newark in, you -- the harm falls from 969 to 927,
13 so it's a gap of 70 million. Substantial, but you're left
14 with a big number at the end of the day. But also, I still
15 think that the economics show that the more appropriate
16 markets for the purposes of evaluating the NEA involve
17 defining LaGuardia and JFK as separate end points from
18 Newark. And I showed you a number of different analyses on
19 direct and they really fall into two buckets.

20 One bucket are analyses of the way consumers make
21 decisions, and I showed you that consumers seemed to -- there
22 seems to be this preference for LaGuardia and JFK among a
23 subset of consumers that applies an amount of differentiation
24 is relevant. And the other sort of evidence that I
25 presented, the other class of evidence, is that firms,

1 American and JetBlue in particular, seem to be making
2 business decisions that are consistent with that
3 differentiation from consumers. And I did a little bit of
4 that supply side and I'll show a couple more to flesh out
5 that side of the bucket.

6 **Q.** In his testimony, Dr. Israel seemed to be saying that the
7 conclusions you draw based on the merger guidelines analysis
8 that you did are wrong.

9 How would you respond to him?

10 **A.** Well, the Horizontal Merger Guidelines really poses a
11 pretty simple question. In this context, it's -- the
12 question is whether enough customers that currently fly out
13 of JFK and LaGuardia would switch to Newark for a price
14 increase out of JFK and LaGuardia to be unprofitable. And
15 you know, the -- together, the evidence indicates that the
16 answer is no and I don't think that it's really a close call.
17 And the reason is that if you look at JFK and LaGuardia,
18 you've got competition not only between American and JetBlue,
19 but also between Delta and a number of other carriers, and
20 that competition matters. And so the thought exercise of the
21 loss of competition at JFK/LaGuardia, well, that's going to
22 create market power, and that's the sort of thing that the
23 guidelines test is trying to get at.

24 And that's why I said it's not really surprising
25 that, when you put this through a formal model, you get the

1 answer, and I think Dr. Israel actually says something pretty
2 similar, like, of course the model is going to find this, if
3 you merge everything together at those airports. So the
4 answer to the specific question posed by the Horizontal
5 Merger Guidelines, I think, is actually pretty clear in this
6 case.

7 **Q.** Dr. Israel concluded that Newark and LaGuardia and JFK
8 are all in the same market. What has he done to support that
9 conclusion?

10 **A.** Well, I mean, his claim, as I understand it, is we just
11 can't leave out United's hub in Newark, and I haven't found
12 that he ever tests this assertion or provides support for it.
13 It's more of a claim. He says it's obviously not doable.
14 And he says that if I -- if he went through a complicated
15 method that told me a hub carrier in New York was not part of
16 the market, I would just be certain that the method was
17 wrong. So -- actually, I want to digress a little bit.

18 He calls the model complicated. This is not a
19 complicated model for economists. It's been in our toolkit
20 for 25 years. It's the sort of model that I teach to my
21 Ph.D. students in the second week of class. So it's a well
22 vetted model. We understand how this thing works. But the
23 big picture here is that Dr. Israel, as far as I can tell,
24 doesn't provide analysis that supports -- that supports sort
25 of, I think, his opinion or his assertion.

1 **Q.** You mentioned you looked at some documents regarding
2 market definition. What were you referring to?

3 **A.** Yeah, I wanted to give a little bit more context around
4 the idea that the decisions that American and JetBlue make
5 are consistent with this differentiation from the -- are
6 consistent with the notion that some consumers just prefer
7 LaGuardia and JFK. And I've already talked a little bit
8 about that, and I showed you in my direct testimony that
9 price matching is more likely to happen between LaGuardia and
10 JFK than it would be between JFK, LaGuardia, and Newark, for
11 example, but these are two documents. The one on the left is
12 interesting because it's a JetBlue document that talks about
13 the New York City -- the New York focus city, which is, I
14 understand it, includes Newark and JFK and LaGuardia, but it
15 mentions that flying out of Newark strengthens them in New
16 York City, and it brings low fares to customers and it
17 increases a catchment area that doesn't largely overlap with
18 LaGuardia and JFK. So here you have a document that refers
19 to a strategy around New York, overall, but even within that
20 New York focus City is making different decisions for Newark
21 and JFK, and recognizing that these are sort of different
22 places and consumers see them differently.

23 Now, the one on the right is a JetBlue document,
24 and it's an analysis -- I mentioned this, but I didn't show
25 this document last time. It's an analysis of whether JetBlue

1 should enter San Juan from Newark. And the top of the
2 document, it notes again that the large majority of JetBlue's
3 JFK/San Juan catchment is east of the Hudson River. And it
4 points out that opening New York, at the bottom, you see
5 opening to Newark to San Juan provides an opportunity to
6 expand in San Juan, without cannibalizing existing JFK
7 demand.

8 So this is a document from 2010. It's a little bit
9 older, but I've also shown you the deposition testimony of
10 Mr. Laurence who says that, indeed, there is a difference in
11 the catchment areas of JFK and LaGuardia and Newark. On the
12 other hand, also that JFK and LaGuardia have similar
13 catchment maps. And in the context of this investigation,
14 Mr. Laurence confirmed that that is likely still the case
15 today, even in the presence of COVID.

16 **Q.** Dr. Israel mentioned that your model is a national one,
17 not a local one and that local models face weak instruments.
18 Is he correct?

19 **A.** He's -- I think it's a misleading argument. And I
20 thought I was going to have to explain weak instruments, but
21 maybe I don't. Just for a little bit of background, I used
22 instrumental variables in my model, and the purpose in
23 estimation is to tease out causal effects from correlations.
24 So that's the context. And when you use instruments, you
25 want them to satisfy a couple different conditions, just as

1 was explained. One of which is that you don't want the
2 instruments to be so-called weak. Okay. So that's the
3 backstop. The baseline model that I have is a national model
4 and I think that's the right one to use. It uses all the
5 information that we have throughout all the routes. But it
6 is the case, if you estimate nationally, that you don't have
7 all of the very specific local decisions, and that's relevant
8 for my analysis in the sense that, you know, there are some
9 metropolitan areas that I tried to focus in more because they
10 matter here, like Boston, New York, and D.C. And so I looked
11 at each of those individually. And what I found looking
12 with -- in New York specifically is that the baseline results
13 I get from the national model are corroborated if you look
14 specifically and separately analyze the decisions that
15 consumers make in New York.

16 Now, Dr. Israel mischaracterizes what I wrote about
17 weak instruments in the context of these checks. The
18 JFK/LaGuardia specific estimates pass a test for weak
19 instruments. So I view them as reliable and a useful
20 corroboration of what I find with the baseline model.

21 When I look at the JFK/LaGuardia specific
22 estimation, all of the markets pass the horizontal market
23 test using that specific model, and that makes economic
24 sense. Again, it's the competition that JFK and LaGuardia
25 matters. And if you lost all of that competition, then it

1 could have negative repercussions for consumers.

2 **Q.** There's been some mention of the circle principle.
3 What's your take on how Dr. Israel applied the circle
4 principle to the New York area airports?

5 **A.** Well, let me first give, just to put this in context,
6 give a notion of what this circle principle is. The idea is
7 that if you've got two products on the market, and then
8 there's a sort of another product that's sort of in -- you
9 know, a closer substitute to one of the two, than the two
10 are, then they should to market, as well. So that's what
11 we're talking about here.

12 And market definition often begins with common
13 sense groupings. So I start with airports, as that sort of
14 the common sense recognizable groupings, and I apply the
15 market definition principles in that context, including the
16 circle principle. You know, if they're an airport that was,
17 you know, closer to JFK than LaGuardia, I would include that.
18 And if there were -- you know, if there were an airport that
19 was closer to LaGuardia than JFK, I'd include that, too. But
20 there's not, so I don't. You know, my approach here is
21 simple and it's consistent with the economics, and it's
22 consistent with the evidence, as I understand it.

23 Like if you think about a lot of the competition
24 here, there's -- you can put it in three buckets between
25 JetBlue and American coming out of LaGuardia and JFK.

1 Sometimes they fly -- they both fly nonstop routes coming out
2 of JFK. Sometimes they both fly nonstop routes coming out of
3 LaGuardia. You know, sometimes they both fly -- one of them
4 flies out of JFK nonstop, and the other flies out of
5 LaGuardia nonstop, and those are the combinations.

6 And so in principle looking at this, you can go
7 route by route, and sort of do something more granular, like
8 focus on one, focus on the other, focus on the other, but to
9 me, that doesn't make a lot of sense, because we already know
10 in the record that the catchment areas of LaGuardia and JFK
11 are similar, and we know that when -- when JetBlue and
12 American look at matching prices, they're more likely to
13 match across those two airports. And so it's just a simpler
14 approach to just put JFK and LaGuardia together and then
15 apply the same structure across all of the routes.

16 **Q.** I believe you have prepared a slide that provides an
17 example. Can you walk us through it?

18 **A.** Yeah. And this is -- I can. And this is showing how, I
19 think, Dr. Israel's argument about the circle principle, it
20 actually can lead to -- it's misguided and can lead to funny
21 conclusions or peculiar conclusions, maybe I should say, and
22 I'll consider the case of JFK and LaGuardia to Phoenix. All
23 right? And in this particular market, there's three carriers
24 that serve it nonstop from JFK. Delta, JetBlue, and American
25 all serve it nonstop. And you know, what I've been able to

1 learn about this industry tells me that that competition is
2 likely to be meaningful. And if you had a loss of
3 competition between those three nonstop carriers, between JFK
4 and Phoenix, that would be meaningful consumers. So in some
5 sense, we've already answered the question. This is going to
6 be a relevant market.

7 Now, as part of my common sense groupings, I also
8 include connects from JFK and from LaGuardia in the market.
9 And so Dr. Israel's assertion is that because I include the
10 small connect routes, I also had to bring all of the Newark
11 routes into the market. And that just doesn't make sense to
12 me. It's like the tail, you know, wagging the dog. It's
13 saying the smallest, most inconsequential routes, these small
14 connect routes, because those are in the market, I've got to
15 bring in a whole other -- a whole other nonstop competitor
16 from Newark, even though the bulk of the data indicates that
17 substitution from JFK to LaGuardia to Newark is limited, and
18 unlikely to constrain the exercise of market power by the
19 three -- the three carriers that are on the slide.

20 **Q.** Dr. Lee presented some taxi data maps that he had
21 created. Why did these look different than the ones that you
22 made?

23 **A.** Well, Dr. Lee's taxi data provide counts. In other
24 words, how many customers fly -- leave from Manhattan to go
25 to each of the three airports, rather than to share, so

1 how -- you know, what proportion of them go to Newark, and
2 what proportion of them go to JFK and LaGuardia. Okay? And
3 so the first observation is that it makes sense that a lot of
4 customers go from Manhattan to Newark. A lot of taxis go
5 from -- because there's a lot of people in Manhattan. But
6 the way that he's reported the information hides relevant
7 facts. And that's what I'll explain.

8 So I want you to -- I think it makes sense to look
9 at the very bottom right of the chart, and this gives the
10 legend. And you can see that if 50,000 -- any zone that
11 generates more than 50,000 rides is going to be what we would
12 call top-coated. Okay? So it gets the deepest shade color,
13 and that's the way this is done. So that could be 50, 60,
14 70, anything like that. And it's hard to compare across
15 these panels because Dr. Lee chose to put them in different
16 colors, but if you look at each one of them, and you might
17 get the sense that sort of the deepest shade is actually more
18 likely to occur for JFK and LaGuardia than it is for Newark.
19 And in fact, that's the case.

20 The table that I've added on the top left shows you
21 that in the Newark plot, there's 50 -- 50 taxi zones that are
22 top-coated. And what I mean is that these are zones --
23 excuse me, there's five zones from Newark. Five zones that
24 go to Newark that are top-coated of that 50,000 thing. So at
25 least 50,000 passengers. Okay? Whereas if you do the same

1 calculation for JFK and LaGuardia, 36 of them reach the top
2 level. Okay? Have at least 50,000 passengers.

3 Now, but now we can think about what does a
4 top-coat do? A top-coat makes it look the same, whether it's
5 50, or 60, or 70, or 80. Okay? So let's unpack that a
6 little bit. And what I've shown you here is the results for
7 the midtown center taxi zone. It's a taxi zone just south of
8 Central Park, and this is -- this is a zone where all three
9 receive a top-coat in the deepest shade. And you can see
10 that Newark has 59,000, JFK has 115,000, and LaGuardia has
11 219,000. So all of these received the deepest color.

12 They're observationally equivalent in the figure, even though
13 JFK and LaGuardia count for 85 percent of the rides, and
14 Newark accounts for 15 percent of the rides, and this is why
15 I say it's sort of more helpful to look at just simply the
16 proportion of customers that choose one airport or they --
17 over the other. And that's what I've done and when I report
18 my catchment maps or my analysis of the taxi data and so on.

19 **Q.** Dr. Lee criticized the taxi data maps that you created
20 for leaving out some Uber and Lyft data.

21 What's your response to that?

22 **A.** Adding in the Uber and Lyft data doesn't make much of the
23 difference. On the left, I've got the exhibit that's in my
24 report. On the right, I've got an updated exhibit that
25 includes all of the Uber/Lyft data.

1 **Q.** We've heard some testimony from Dr. Brueckner about his
2 academic research with doctors Lee and Singer. What's your
3 opinion on that research?

4 **A.** I don't view Professor Brueckner's method, which I may
5 call BLS, for Brueckner, Lee, Singer, as informative for the
6 purposes of antitrust market definition, and I'll explain
7 why. It starts with a nice concept, okay, and the idea is
8 you see a competitive effect in airlines, so like maybe an
9 entry happens and prices go down ten percent at an airport.
10 Okay. And then for -- there is another airport that may be
11 nearby, and the idea is that in the data, you see the prices
12 go down five percent. And I think Professor Brueckner is
13 right, that that's -- he calls that spillover, right? That's
14 evidence of some sort of consumer substitution between these
15 airports, so it's starting in the right spot.

16 But then the question is, as you compare ten to
17 five, is that economically meaningful in the context of can
18 you exercise market power, and that ends up being a very
19 different, difficult test. We don't have a good economic
20 tool to say that ten is economically meaningfully different
21 than five in the context of the Horizontal Merger Guidelines
22 Hypothetical Monopolist Test. And so this is just a
23 fundamental problem.

24 Now, the approach of BLS is not to really talk
25 about economics at all, but rather to pivot to statistics

1 instead. Okay? But that has consequences. It means that
2 any two airports will be grouped together with insufficient
3 data. And it means that any two airports will be deemed to
4 be separate for the purposes of market definition with enough
5 data. All right. And I've given sort of a table that's
6 tried to give you a couple of examples of this. So the first
7 one is suppose we have an instance where, you know, an entry
8 event happens, and the price of one airport changes by
9 12 percent, and the price of the other airport changes by
10 2 percent, because that's what actually happens, okay, And
11 suppose we think that's a meaningful difference, economically
12 speaking.

13 MR. WALL: Your Honor, I object to this testimony,
14 it was not provided in his reply report.

15 MR. DERITA: Your Honor, he's simply responding to
16 testimony that was presented by Dr. Brueckner in his direct.

17 MR. WALL: That is not an excuse, the way the
18 obligations work because that's why we have reply reports.

19 MR. DERITA: And I believe this was addressed in
20 Dr. Miller's reply report.

21 THE COURT: Where?

22 THE WITNESS: I have a section -- I'm sorry.

23 THE COURT: Yeah, you can.

24 THE WITNESS: I have a section that responds to
25 this.

1 THE COURT: Just what part of this report is this
2 included?

3 THE WITNESS: It's the reply report on market
4 definition. I can look, I don't know what section of -- but
5 it's the reply report, I've got a section on this and I talk
6 about a number of problems, but the -- I'm highlighting the
7 statistical problem that I discuss in that section.

8 MR. WALL: I mean, maybe the easiest thing to do is
9 just, as a voir dire question, is the example given here
10 contained within the reply report?

11 THE WITNESS: I can answer that, too.

12 THE COURT: Sure. Go ahead.

13 THE WITNESS: The argument is given. The
14 particular example I'm using to explain the argument to the
15 Court is not in the report.

16 THE COURT: Overruled. Go ahead.

17 THE WITNESS: Okay. So where are we? We're on the
18 first row. Okay? So we've got -- we've got a setting where
19 there's a 12 percent change and a 2 percent change. Well,
20 suppose that's economically meaningful. All right. If it
21 turns out you just don't have much data, or you only see a
22 couple of these competitive events, then just econometrically
23 speaking, there's not going to be a lot of statistical
24 precision. All right. When you look at sort of the standard
25 of errors that Professor Brueckner was talking about and the

1 co-variances he was talking about, the conclusion the BLS
2 will reach is that the statistical precision is insufficient
3 to tell -- to statistically tell the difference between the 2
4 and the 12, and so these markets get grouped together.

5 But the second row considers the opposite case.
6 It's one where there's a 2 percent effect on one, and a
7 3 percent effect of the other. And suppose we think that
8 that's -- that's a very similar effect. And so these two,
9 you know, maybe the evidence suggests they should be in the
10 same market. But then suppose when you do the BLS test,
11 you've got a situation where you've got great data, a lot of
12 entry and exit events, a lot of observations. In that case,
13 you've got a lot of statistical precision. And if there's a
14 lot of statistical precision, then you looking at this, you'd
15 look at the two and the three, and you'd put them in
16 different markets. And this is why I say it's a statistical
17 test and not an economic test. It doesn't provide a
18 framework for thinking about whether there's meaningful
19 economic differences across these two airports. So I don't
20 view it as providing a path forward understanding market
21 boundaries in airlines, or really anywhere else, because it's
22 a general test that could be applied anywhere, but there's
23 very little economic content, and there's -- there's very
24 weak connection to the Hypothetical Monopolist Test.

25 **Q.** I'd like to pull up page 19 from Dr. Israel's testimony

1 on Monday, where he discussed one of his papers analyzing
2 international alliances. And if we can highlight line seven
3 through ten. The text that reads, "The nonstop overlaps are
4 important routes. There has been lower prices and more
5 capacity on those routes. They have benefitted the nonstop
6 overlaps. That's a strong finding in the paper."

7 Dr. Miller, is that testimony consistent with how
8 Dr. Israel described the paper in his report and with your
9 understanding of the results of that paper?

10 **A.** It is inconsistent with the statement of the report and
11 it is inconsistent with what's in the paper. And for
12 context, this is talking about international alliances and
13 the nonstop overlaps that exist on international alliances.

14 **Q.** In light of Dr. Israel's testimony, are you aware of any
15 literature inconsistent with a strong finding of lower prices
16 and more capacity on nonstop overlaps and international
17 alliances?

18 MR. WALL: Objection, Your Honor. This is
19 completely outside the scope of Dr. Miller's testimony. I've
20 never --

21 THE COURT: Can you just repeat the question first
22 and then I'll hear the objection.

23 MR. DERITA: Sure. In light of Dr. Israel's
24 testimony, are you aware of any literature inconsistent with
25 a strong finding of lower prices and more capacity on nonstop

1 overlaps and international alliances? And those words were
2 from this transcript.

3 THE COURT: And what's -- now state the objection?

4 MR. WALL: Yeah, the objection is this is
5 completely outside the scope of Dr. Miller's testimony. He
6 never addressed the effects of international alliances in any
7 one of his reports. He didn't address it on -- in his first
8 testimony. And furthermore, this question is an effort to
9 elicit an answer that would violate an objection that you
10 sustained during the cross-examination of another witness.

11 THE COURT: Remind me what that was.

12 MR. WALL: That was in Dr. Brueckner's examination,
13 when they tried to go outside the scope of Dr. Brueckner's
14 examination to talk about a paper that he wrote on
15 international alliances.

16 MR. DERITA: Your Honor, Dr. Israel's description
17 at trial differed from the description that was given in his
18 report. This is the first opportunity that Dr. Miller would
19 have to have addressed that inconsistency between the report
20 and what was said at trial.

21 MR. WALL: There is no inconsistency, first. But
22 second, what they're trying to do doesn't address the
23 inconsistency. It's trying to use a strawman inconsistency
24 that doesn't exist on the face of it. That's exactly what
25 Dr. Israel's paper says.

1 THE COURT: Sustained.

2 (Counsel confers.)

3 BY MR. DERITA:

4 **Q.** Okay. Let's move on. Dr. Israel presented an analysis
5 of the number of competitors on Boston and New York City
6 overlap routes. What's your opinion of that analysis?

7 **A.** Well, this is one of the few instances in which
8 Dr. Israel acknowledges that that competition in particular
9 routes is -- can matter for outcomes. And I'll get into this
10 in a moment. Like I understand that the way Dr. Israel sees
11 competition is involving sort of these hub-and-spoke systems
12 that legacy carriers put together. And I agree with him that
13 the hub-and-spoke systems can have value for the legacy
14 carriers and for passengers and maybe in particular these --
15 what they called the power passengers that are traveling.
16 That makes sense to me and it's just -- that's part of
17 airline economics. But it's also a narrow view, because
18 there's different business models out there. And different
19 things matter to different passengers.

20 And one of the things that you see with JetBlue,
21 for example, is that it tends to operate these point-to-point
22 routes. And the business models to compete against the
23 legacy carriers, and bring that sort of, you know, unique
24 combination of quality and low cost in a way that drives
25 prices down and ultimately matters for customers. And so,

1 you know, when I look at this, I think that we -- one of the
2 important parts of understanding the likely competitive
3 effects of the NEA is how things play out on particular
4 routes where American and JetBlue compete, and I think that
5 that competition, the price competition that creates matters
6 for all the consumers, but it especially matters for the
7 customers in the back of the plane that are cost conscious,
8 that actually fill up the bulk of the seats.

9 So with that said, let's look at the table itself.
10 And I wanted to -- I just wanted to show a couple of things.
11 The left table is the analysis of New York. And that
12 includes Newark, which is -- it's just what's there. And
13 then the right is an analysis of Boston. And the number I'll
14 start with is the 37 percent that's at the bottom right in
15 the New York table, and I'll just try to -- try to clarify
16 what that number is, because I find it hard to keep in my
17 mind, so I'll try to say it precisely.

18 We're looking at all the routes that JetBlue and
19 American fly out of New York City. All right? And looking
20 at all of the passengers that fly on those routes, including
21 passengers from United and Delta, anybody else. Okay. So
22 it's anybody who flies on a route, where American or JetBlue
23 provides nonstop service. That's my understanding of the
24 number. And what it tells you is that 37 percent of those
25 customers fly along routes that are not overlaps.

1 So what's interesting to me is you can flip that
2 around and you can conclude that 63 percent of the customers
3 that fly on routes that American and JetBlue both fly
4 nonstop. And what that tells me is that, in the broader
5 scheme of New York City, there are a lot of routes on which
6 American and JetBlue compete. And this is sort of
7 competition between them on the nonstop overlaps isn't this
8 narrow thing that's a handful of markets, it's a big part of
9 the competition in New York City, and I'm going to come back
10 to this with my own calculation in a moment.

11 The other thing to note about the table is that
12 Dr. Israel puts -- classifies routes according to the number
13 of other nonstop carriers that fly the route. And in his
14 direct, he made assertions along the lines of, you know, if
15 there are enough other carriers, there's unlikely to be a
16 competitive problem. And you know, just as a matter of
17 analysis of a competitive environment, I understand that all
18 else equal, and having another competitor is likely to
19 generate better outcomes for consumers, but simply knowing
20 the number of firms in a market doesn't give you all of the
21 information.

22 And there's a lot more that we do, that I do in
23 antitrust, that's intended to analyze particular market
24 details that matter. You know, is it the case that one
25 carrier has lower cost or a higher quality product than the

1 others? You know, might it be the case that two carriers are
2 well positioned to serve the markets and two carriers are more
3 peripheral. These sort of things are relevant for looking at
4 at the likely competitive effects of a transaction. And
5 Dr. Israel accepted some of that, at least I think, when he
6 started on cross, sort of accepting that, well, if JetBlue is
7 on the route, it could be a different result, if JetBlue is
8 not on the route, and this sort of thing. And so these
9 details matter, and that's what I tried to analyze in the
10 course of my -- in my reports and my testimony.

11 **Q.** Is it possible for consumer harm to result on the route
12 when there are three other carriers resuming -- remaining
13 after a transaction of what's called, usually, five to four?

14 **A.** A five to four merger -- we'll do a merger, just for
15 simplicity. Suppose you go from five to four. And the
16 question is: Can you have competitive harm? And the answer
17 is an unambiguous yes. Okay.

18 And the way to think -- one way to think about this
19 is in terms of the Herfindahl Index. If you have a perfectly
20 symmetrical firms, so all five firms are equal to each other,
21 and you have a merger that takes you down to four firms, then
22 the HHI is going to be at least 2,500. And to benchmark that
23 for you, that's the level that the Horizontal Merger
24 Guidelines say constitutes a highly concentrated market.

25 So in a setting where there's five and you go to

1 four, already we're reaching levels of concentration that the
2 merger guidelines suggest are -- are problematic and, you
3 know, the DOJ may, depending on some other things, presume a
4 likelihood of anticompetitive effects.

5 But that doesn't mean that the harm could be even
6 more than that. For example, in a five to four it could be
7 the case that the loss of competition involves two carriers
8 or two firms that are large in the market, and there's three
9 more that are small. And that might be an indicator that,
10 all else equal, there's a big problem there.

11 Or it might be a big firm or maybe two small firms
12 are combining. And it is two small firms combining,
13 actually, that's a situation that might go in the other
14 direction. Maybe in a five to four, there's less problem.

15 But the point is that the details of this matter,
16 and simply saying five to four isn't enough to -- isn't
17 enough to conclude that there's no problem.

18 **Q.** What information would you suggest better measures
19 competition?

20 **A.** We developed a number of tools. And I've looked at a
21 number of different analyses in the context of my report, for
22 example, and my testimony. But one of them is actually
23 market shares, because market shares pick up not only whether
24 a firm is present in the market, but also it gives you some
25 notion for the ability to compete, the ability to provide a

1 product that consumers value.

2 And that's why I showed, for example, revenue
3 shares in 2019 coming out of Newark. And that's the bottom
4 line, and JFK/LaGuardia for the top rows by American and
5 JetBlue. And I showed you that along these nonstop overlap
6 routes, the market shares are 50 percent, 40 percent,
7 sometimes higher, sometimes a little lower. But these are
8 meaningful market shares.

9 **Q.** How did these market shares compare with the parties'
10 airport level market shares in New York?

11 **A.** Well, this a pie chart from my reply report, And it just
12 shows that, on the left, that American accounts, in 2019, for
13 22 percent of traffic, domestic traffic, at JFK and
14 LaGuardia, and JetBlue accounts for 19 percent. So they
15 account -- we know they account for a good chunk of capacity
16 at JFK and LaGuardia.

17 And now I'm going to bring in that number that
18 Dr. Israel calculated, which suggests that, actually, there's
19 a lot of overlap there between the red and the blue. But
20 here I'm going to update the number. I'm going to give you
21 something different that will focus on JFK and LaGuardia, and
22 that's the comments on the right. What I've calculated is
23 that among the markets with the JFK and LaGuardia endpoint,
24 and this includes nonstop overlaps, mixed overlaps, all the
25 markets with the JFK/LaGuardia endpoint, 57 percent of

1 American passengers are on these nonstop overlaps coming out
2 of JFK and LaGuardia. And 70 percent of JetBlue passengers
3 are on the nonstop overlaps coming out of JFK and LaGuardia.

4 And my conclusion from that is that the routes that
5 I showed you on the previous slide which had those market
6 shares, shouldn't be interpreted as just sort of a small set
7 of routes that are inconsequential in the grander scheme of
8 everywhere that JetBlue and American fly out of New York.
9 They account for a lot of the passengers.

10 **Q.** What are the Boston route shares?

11 **A.** Boston shares are even higher. I show this again. And I
12 think, you know, what -- we can dig in a little bit to one of
13 these, just to tease out the difference between shares and
14 competitor accounts. And, for example, Miami there is a nice
15 example. In Miami, American and JetBlue account for
16 76 percent of the revenue in 2019. That leaves 24 percent
17 unaccounted for. You know, on this route is -- the third
18 largest competitor is actually Spirit. Delta flies this
19 route, and actually Frontier has something like a one percent
20 market share, as I understand it, on this route. So
21 depending on how you count it, this would be a route that has
22 four nonstop competitors, or maybe five nonstop competitors,
23 if you count Frontier's small share. So it's a setting where
24 there's, you know, four, maybe five competitor accounts, but
25 two of these carriers are doing most of the flying and

1 capturing most of the revenue.

2 **Q.** And how did the Boston airport level shares look?

3 **A.** This is 2019. Again, the -- showing the defendants'
4 share of domestic traffic at Boston Logan. And American has
5 19 percent of that traffic, JetBlue has 33 percent of the
6 traffic. JetBlue had 21 percent of the traffic. And so the
7 American and the JetBlue, again, account for a lot of the
8 traffic that comes out of Boston in 2019.

9 And I've done the same comparison. You know, in
10 markets that have a Boston endpoint, 76 percent of American
11 passengers are on a nonstop overlap, and 28 percent of
12 JetBlue passengers are on a nonstop overlap. And it makes
13 sense that there would be some asymmetry in those numbers
14 because JetBlue just flies more places than American does.

15 But my conclusion from that is similar to my
16 conclusion with the New York markets, which is that the
17 nonstop overlaps that I focus on and that are the main source
18 of harm in my model, aren't just some isolated routes but
19 they matter in the broader context of Boston.

20 **Q.** The Boston shares that you presented are for 2019. Have
21 American and JetBlue's positions in Boston changed over time?

22 **A.** They have. And this is a line graph that shows passenger
23 shares from 2007. And I'll just trace it through to 2019.

24 And I can just characterize a couple patterns pretty fast. I
25 mean, this is a market that JetBlue entered in 2004. By

1 2010, JetBlue flew a larger passenger share than anybody
2 else, and its share of passengers increased through 2019,
3 which is evident.

4 We can also see that Delta Air Lines, which is sort
5 of the purplish line, starts growing around 2013, and
6 increases through to 2019, when they pass American. And we
7 see that American's share is -- actually, they're number two
8 in 2014, and it decreases through 2019.

9 And you know, my conclusion for this is I observed
10 that JetBlue grew in this market by making its own
11 investments, and I observed that Delta grew in this market by
12 making investments, doing, you know, what's been called in
13 the context of this trial, organic growth. And my takeaway
14 is that really very little about what happens in Boston is
15 inevitable, or at least this table is inconsistent with a
16 narrative that suggests sort of that there's inevitability
17 about the ability of an airline or a carrier to provide
18 service in an airport. Rather, you see these numbers moving
19 around as carriers invest or don't invest in an airport.

20 **Q.** Okay. We're going to switch gears and I'm going to show
21 you a demonstrative that Dr. Israel used to explain his view
22 of the MGIA. What's your take on this slide?

23 **A.** On this slide, Dr. Israel is -- makes an argument that
24 the NEA, together with the MGIA -- remember, the MGIA is the
25 subagreement that does the revenue sharing, is very different

1 from a merger, and it presents sort of a number of boxes.
2 And unfortunately, I think that, you know, in each of these
3 boxes he gets the economics wrong, so I just want to walk
4 through it quickly and I'm going to start on the right. And
5 the right is the fixed proportion profit sharing. And the
6 question is, is fixed proportion profit sharing different
7 than a merger?

8 And you know, the reason that Dr. Israel gives, the
9 main reason he gives is that there's no control. You still
10 have two firms that can make decisions with fixed proportion
11 profit sharing, whereas with a merger, that's just -- you
12 know, one firm makes the decision. And it's true that
13 there's a literature that looks at sort of interesting
14 transactions, interesting things like revenue sharing or
15 situations where, you know, one person owns 80 percent of one
16 company and 25 percent of another company, and that creates
17 interesting effects and control can matter, but that same
18 literature shows that if you've got full profit sharing, so,
19 you know, according to fixed proportions, for example, that
20 actually control does not matter. And that should be
21 intuitive, because the incentives are blind.

22 If JetBlue made the decision, they choose one
23 thing. If American made the decision, they choose the same
24 thing, because profit sharing aligns incentives. And the
25 economics of this, I think, are both intuitive, but they're

1 also simple to prove. You know, I've given a couple of
2 proofs to show this in the context of my reports and then a
3 declaration that I submitted as a supplemental thing.

4 So that's the first box.

5 Now let's go to the next box over. This goes to
6 fixed proportion revenue sharing. And -- but revenue sharing
7 creates the same sort of alignment incentives that profit
8 sharing does. It creates the same upward pricing pressure
9 for reasons that I explained on direct. In fact, to the
10 extent that there's a difference is that revenue sharing
11 creates greater incentives to raise price than profit
12 sharing. And I explained to you that that's because when a
13 firm raises price, not only can they recapture revenue, but
14 they also sort of shift the cost of flying the plane, flying
15 the customer to the other carrier. Okay. So there's this
16 extra benefit with revenue sharing. And so both revenue
17 sharing and profit sharing create new incentives for prices
18 that are the incentives that are created by a merger, but
19 revenue sharing, if anything, just does it a little bit more.

20 So now we can go one box over and we're going to
21 ask -- we're going to examine fixed proportion revenue
22 sharing with different cost structures. And I think
23 Dr. Israel represented potentially three different things
24 here, and I want to try to address all three. The first is
25 that, as I read his testimony -- maybe I won't characterize

1 what he says, I'll just explain the economics. Upward
2 pricing pressure does not depend on whether firms have the
3 same cost or different cost. Either way, if the costs are
4 the same or they're different, either way, they gain if they
5 can recapture customers, and so the economics doesn't require
6 you to have the same cost. That connection just does not
7 exist, as a matter of the underlying economics.

8 In this particular context, suppose you thought
9 that JetBlue had a lower cost than American, if it raises
10 price, it is still able to recapture some of those customers
11 with the American product, and all else equal, it creates the
12 upward pricing pressure. So it would be incorrect to say
13 that the logic of a merger incentive doesn't apply with
14 different cost structures. Okay. That's the first
15 observation on this box.

16 The second observation on this box is that my model
17 does not impose that JetBlue and American or any other
18 carriers have the same cost structure. I allow for firms to
19 have different costs for different qualities. All of that in
20 is in the model. All of that richness is in the model. It's
21 there in the real world. It's there in the model, too. So
22 the model is not some -- on this particular dimension, it's
23 not some stripped down thing that misses a lot of the
24 economics.

25 And then let me go to the third observation, which

1 is it's possible that one might think that just somehow
2 JetBlue is immune to these sorts of pricing pressure, so
3 JetBlue has -- sort of has this JetBlue effect and that's,
4 you know, always going to be there and they don't respond to
5 incentives. But that's directly contradicted by my analysis
6 of how JetBlue priced in the wake of the MAX 737 grounding,
7 in which competition went out of the market, and JetBlue
8 responded by increasing its price, which, of course, is the
9 way a profit maximizing firm would respond. And so my
10 interpretation of that is that JetBlue has incentives and it
11 outpricing those incentives maximized price.

12 Okay. Let me go one box to the left. Now, we're
13 in the final box. This incorporates dynamic revenue sharing
14 with expansion incentives. And the question is, does this
15 change the analysis that we've just walked through? And the
16 answer is no. It's an important but subtle economic point.
17 And what the point is is that when you sell a ticket on the
18 plane, you've already scheduled the plane. So you can set a
19 higher price or a lower price, but it doesn't change the
20 capacity you've already set on the market. Okay? Because
21 you've already decided that.

22 And so because of that, the choice that you've
23 already made for capacity does not dictate the profit
24 maximizing price that you'll set. It's what you call a sunk
25 decision. All right? And if that decision -- in economics,

1 it's a funny term. If the decision is sunk, then the pricing
2 thing is going to be made taking it's as given that's already
3 happened. And so the fact that the revenue sharing may
4 update over time doesn't change the analysis of pricing
5 incentives and the analysis of upward pricing pressure.

6 Okay? And so putting all of this together, you know, the
7 figure makes it seem like you go from a merger to something
8 very far away from a merger, but really none of this takes
9 you away from the incentives that are created by a merger.
10 All of these boxes on the left really should just be sitting
11 over right there with incentives of the merger. And that's
12 what I testified to on my direct and explained in my reports.

13 **Q.** So you just talked a lot about pricing, but the title of
14 Dr. Israel's slide and the footer, I guess you'd call it,
15 discussed capacity. Why did you focus on pricing and not
16 capacity in your run through of this?

17 **A.** Well, I think that the boxes here that Dr. Israel has
18 highlighted are the ones that are relevant for the pricing
19 incentives as I've explained to you.

20 I also think that the merger -- that the NEA
21 creates merger-like incentives for capacity, not through the
22 MGIA specifically, but through the broader context of the
23 NEA, of which the MGIA is only one component. Because it
24 allows for capacity coordination for the mutual benefit of
25 American and JetBlue.

1 **Q.** Dr. Israel presented a formula that he claims proves the
2 MGIA provides incentives to increase capacity. What's your
3 thoughts on that?

4 MR. WALL: Objection, Your Honor. He never
5 responded to that in his reply report. It would be outside
6 the scope of his testimony.

7 MR. DERITA: I don't believe the formula was
8 presented in his report, in Dr. Israel's reports.

9 MR. WALL: Well, then, I guess we have -- I thought
10 he was talking about the proof that you're referring to.

11 MR. DERITA: I'm talking about the slide that was
12 presented at --

13 Do we have a copy of the slide?

14 THE COURT: Overruled.

15 MR. DERITA: I believe, more generally, Dr. Miller
16 did in his reports reply to the claims that Dr. Israel made
17 regarding --

18 Oh, sorry, didn't hear you. I'll stop talking.

19 THE COURT: Go ahead.

20 THE WITNESS: So for context, I provided this
21 answer in words in my reports, but I don't have the math in
22 my report. But the important thing is that the MGIA math
23 that Dr. Israel presented is misleading and incomplete in
24 important ways that I can explain. So the first is that to
25 understand -- understand that what he's doing, he's focusing

1 on a special case, okay, in which to simplify the model, he
2 ends up putting a route in a particular bucket. So the route
3 that he's focusing on is one where, after expansion, the RESM
4 is below average. And in that setting, the MGIA creates a
5 unilateral incentive for each partner to grow. And by
6 unilateral, I mean, it's sort of one carrier can be better
7 off if it grows, setting aside whether that growth is
8 mutually beneficial.

9 So the first point is that this is not a general
10 result. It is one that applies for routes that are low RESM
11 routes, short distance. There's less competition with a
12 partner. But the MGIA can also create unilateral incentives
13 to contract along routes that have sufficiently high RESM,
14 that are sufficiently long distance, or have a lot of
15 competition with a partner.

16 And that's why if you think back to my initial
17 testimony, I characterized it as the MGIA can create
18 unilateral incentive to grow, but it doesn't necessarily do
19 that. Because if you look at the different types of routes
20 as they exist across the NEA airport -- NEA overlaps, some of
21 them are likely to fall in one bucket and others are fall in
22 another bucket, and it's just a complicated thing. That's
23 not super important to understand sort of where Dr. Israel
24 goes with it, just the math is somewhat limited.

25 The more important observation is that the math is

1 not a complete analysis, because it does not consider the
2 partner's cost to funding an unprofitable expansion.

3 So what do I mean by that? The MGIA can create a
4 unilateral --

5 MR. WALL: Objection. Outside the scope of his
6 revealed opinions. He never related this to funding before.

7 MR. DERITA: I believe that's incorrect.
8 Dr. Miller has made this point in his direct and his report
9 multiple times.

10 MR. WALL: He never put in his reports any
11 analysis --

12 THE COURT: If he made the point already, then I
13 don't need it.

14 MR. DERITA: I mean -- okay.

15 Just to clarify, when he says "funding," if you
16 remember the blue and the red bars that were presented on
17 direct, funding means what I believe Dr. Miller was
18 discussing in his direct as exploitation and where one
19 airline pays for expansion by the other.

20 MR. WALL: This is the point, Your Honor, that in
21 all the disclosure that we have had here about how all of
22 this works, there has never been an effort by Dr. Miller to
23 incorporate into his analysis some funding cost that -- that
24 is now just showing up. He's never said this before.

25 MR. DERITA: By "funding cost," it simply means

1 that the revenue sharing provisions of the MGIA -- and we
2 walked through all the math in Dr. Miller's direct --

3 THE COURT: I can say, like, if you walked through
4 it all in direct, then I have it already.

5 MR. DERITA: Okay.

6 BY MR. DERITA:

7 Q. Dr. Miller, did you want to finish explaining the rest of
8 the slide?

9 THE COURT: No, I think we can move on.

10 BY MR. DERITA:

11 Q. Let's pull up a diagram from your direct. I just want to
12 quickly touch on it for you to explain what it is.
13 Eventually we're going to get to Dr. Israel's similar but
14 different chart.

15 Could you walk through what this chart is?

16 A. Yes. This is the chart that Dr. Israel mischaracterized,
17 but it's related to the conversation that we just didn't
18 have. So I'll try to explain why it's a mischaracterization.

19 The top bar here that I showed -- that I gave you
20 on direct shows the best that American and JetBlue can do,
21 and that includes all the capacity changes that they might
22 make that would be in the mutual best interest. Okay. And
23 that's what I mean that capacity coordination can lead to
24 merger-like outcomes.

25 Now, Dr. Israel says why would you sign -- he asked

1 the question, it's a rhetorical question -- why would you
2 sign the MGIA if you didn't want these unilateral incentives
3 in place? But there's a very sensible answer to that. The
4 MGIA allocates revenues to the partner that's doing more of
5 the heavy lifting for the alliance. The carrier that's
6 incurring higher cost because it is flying more routes gets
7 more revenue, and the MGIA recognizes that and allocates the
8 revenue in accordance to that. So it makes sense. It makes
9 sense.

10 But the problem with the MGIA is that it also can
11 create unilateral incentives that undermine the collective
12 good. And that's what I illustrated in the -- on the slide
13 here, is that if American departs from what's best for the
14 alliance because of the unilateral incentives created by the
15 MGIA, it may benefit, but reduce joint profitability. And
16 that comes at -- you know, that's essentially what I call
17 exploiting JetBlue. And again, this is because JetBlue funds
18 the growth. These are the unilateral incentives. And the
19 fact that profit goes down here is by definition. Because
20 the top bar is showing the best that American and JetBlue can
21 do.

22 And if you -- if you recall, I gave you some
23 documents and testimony that suggests that this isn't just
24 sort of theoretical thing. It's something that was actually
25 recognized as a potential outcome of the MGIA. And the

1 documents that I gave also showed you that capacity
2 coordination was the means to protect against it.

3 **Q.** Okay. Well, let's turn to Dr. Israel's version of this
4 chart. Can you explain the difference between your diagram
5 and his?

6 **A.** I can. I mean, first of all, Dr. Israel's diagram
7 doesn't make sense. Because we start with the best that you
8 can do. Okay. And there may be mutually beneficial profit
9 expansion that happens as the part of the NEA. Like take
10 that as a possibility. That's in the top line. Okay? So
11 how do you get to the bottom lines that Dr. Israel shows?
12 And the only way is by not counting the cost of funding
13 unprofitable expansion. The way you get here --

14 MR. WALL: Objection. That's -- it's the same
15 point. We just raised earlier. He's never said that.

16 MR. DERITA: He's said it multiple times, and it's
17 in his report in Section 4.2.

18 THE COURT: Overruled.

19 THE WITNESS: The way you can have profit appearing
20 to be better than the best is because Dr. Israel's math, if
21 JetBlue funds expansion from American, he counts the benefit
22 to American but doesn't account the loss to JetBlue of
23 funding it.

24 And then the flip side applies, too. If American
25 funds JetBlue expansion, he counts the -- that what American

1 gets, but he doesn't account the loss to JetBlue. So it's
2 sort of like you can do something that loses money, and you
3 can do another thing that loses money, and you add it all up,
4 and actually you've earned money. And it's because of a --
5 you can say it's sort of a double-counting issue, but it's
6 really sort of a dropping a term. So the math just doesn't
7 add up.

8 BY MR. DERITA:

9 **Q.** Dr. Israel characterized the MGIA in his testimony as a
10 beneficial contract that incentives growth. Do you believe
11 the NEA and MGIA do that?

12 **A.** I don't think it's as simple as Dr. Israel makes out.
13 You know, what he said is that if a company can sign a
14 contract that commits it to grow, then it makes sense to do
15 that. Well, that's a strong statement. It can be true under
16 particular instances, but there are a lot of other things
17 that matter, including the competitive environment. And in
18 the context of the NEA, including that if JetBlue grows, it
19 cannibalizes some revenue from American and vice versa. So
20 the effect is just not as uniform as Dr. Israel claims.

21 In Dr. Israel's report, he attempted to show that
22 it works more often than not. And this is the Stackelberg
23 analysis that I mentioned on my direct testimony but didn't
24 get into the details on it. Even within that quantification,
25 the effect goes the other way. It tends to go the other way

1 on the nonstop overlap routes so that the defendants would
2 find it profitable to reduce capacity on the nonstop overlap
3 routes. And that makes sense, because that's where
4 there's -- this competitive incentive becomes very important.
5 All right.

6 And so this result is actually consistent with my
7 model of pricing competition, the Bertrand model. And it's
8 consistent with the results that obtain from Dr. Israel's
9 model of quantity competition. That's the Cornell model.
10 All of these models show that the NEA is likely to raise
11 price and reduce quantities along nonstop overlaps, and all
12 else equal, that creates an incentive to reduce capacity
13 along those routes.

14 I mean, at some point it stops being a modeling
15 result, and it's just the right characterization of the
16 economic incentives that come out of the NEA.

17 **Q.** You've mentioned before that a retrospective analysis of
18 the NEA is not informative. Why is that?

19 **A.** I think I gave three reasons. One is that it's hard to
20 interpret business decisions in the shadow of litigation.
21 One has to do with it's difficult to tease out causality for
22 things like this, and that's amplified by COVID. And the
23 third is the NEA is in the process of being rolled out during
24 the data that we have available to us.

25 **Q.** So are you saying that you can -- that someone can never

1 do a meaningful comparison of preNEA -- pre and postNEA
2 prices for retrospective?

3 **A.** Well, Professor Carlton suggests that the answer is yes.
4 I'm just not so sure that it's as easy as he makes it out to
5 be. I'm not sure there's going to be a clean, easy way to do
6 a before and after analysis that's going to allow you to
7 reliably allow you or anybody else to reliably determine the
8 competitive effects of the NEA.

9 And it's not only a matter of COVID. Because you
10 could imagine sort of looking at data from 2019 and comparing
11 it to 2025, for example. But that gap just grew a lot
12 larger. And as the gap grows large, as 2019 recedes to the
13 distance, more and more changes just happen in markets for
14 unrelated reasons and the comparisons get more difficult to
15 draw. And that's sort of why I focused the analysis the way
16 I have, which is to really use a method that isolates the
17 effect of the NEA and focus on that.

18 **Q.** I just want to clarify. I think there was a
19 misunderstanding in the question at the beginning. You said
20 Professor Carlton would -- I believe you said, yes. I think
21 you meant yes, one can be done, and then your explanation was
22 about why you're not so sure; is that right?

23 **A.** I -- maybe I --

24 THE COURT: You'd have to repeat the question, I
25 think, for any of us to be sure.

1 THE WITNESS: I think Professor Carlton said it
2 would be easy. I think it might be harder then he makes it
3 out to be for the reasons that...

4 MR. DERITA: That clarifies it.

5 BY MR. DERITA:

6 **Q.** So you mentioned data issues that present challenges for
7 a retrospective. Can you provide more color on what those
8 are?

9 **A.** I can. And you know, like all methods have problems and
10 no method is perfect.

11 Can I go to the previous slide, please? No method
12 is perfect, but what I want to highlight is that COVID-19
13 sort of amplifies the normal methodological challenge
14 associated with identifying the effect of the NEA and the
15 data that we have available, and I know that there's been a
16 lot of testimony that COVID has mattered for airline markets,
17 but I don't know if we've seen a chart like this exactly.
18 This shows airline traffic out of Boston from 2017 to 2022.
19 And what you just see is the fall in traffic in 2020 as COVID
20 starts hitting. And what I'll point out is that it's not
21 just that traffic went down, it was nearly eliminated in that
22 first quarter. And then it comes back and you can see that
23 the NEA begins to be implemented at the same time the COVID
24 vaccine becomes available. And then some interesting things
25 happen sort of at the end of the sample.

1 You've got the second dot that seems to be pretty
2 high. That's the first holiday season where folks were
3 traveling for the first time to see their family, and you
4 have this big upsurge, followed by Omicron and a down surge.
5 Now, I don't know if that's exactly why you see that pattern
6 in the data. I've tried to mostly forget all about COVID,
7 but if you actually like think about the experience and work
8 it through, there's all these different things that are
9 just -- like moving around the data a lot and the experience
10 of the airlines going through that time period.

11 **Q.** Let's talk about Dr. Carlton's analysis of the NEA. Does
12 his retrospective face the challenges that you mention exist
13 with retrospectives more generally?

14 **A.** Yeah. Professor Carlton, he does face the methodological
15 challenges, and he uses something that's called differences
16 in differences, and he walked you through the logic of it.
17 The idea is you've got some keep control routes and some
18 treated routes. And for this to work, the valid control
19 routes have to respond to nonNEA changes. You know, for
20 example, COVID-19, in the same way that the treatment routes
21 would. I mean, that's what makes them good controls is that
22 they're similar. And the differences in differences, I agree
23 with Professor Carlton, that it's widely used in the
24 literature, but I would add that when we teach it, we teach
25 it far more on the ways it could go wrong, than on simply

1 just applying it. It has to be carefully implemented,
2 because it can create misleading inferences.

3 So if you have a valid control group, then the
4 difference between outcomes in the treatment and control
5 gives an estimate of the NEA effect. I mean, that's the
6 logic of it. Here, valid controls may not exist, either for
7 Professor Carlton, or in the future, And I'll give some
8 context for that. On the graph, we have -- I've plotted the
9 average price or -- it's actually the index, so it equals
10 100 percent in the first quarter of 2019. And you've got
11 that price is the average index for the treated routes in the
12 red and the control routes in blue. And I've shown you the
13 entire preperiod that Professor Carlton uses in this study.
14 Okay.

15 Now, the treated routes are the Boston nonstop
16 overlaps, and the control groups are other Boston markets
17 where American flies nonstop, or JetBlue flies nonstop, but
18 they're not overlaps, only one of them flies. In fact, the
19 vast majority, all but one of these, are routes where JetBlue
20 flies nonstop. I think there's like a Harrison, Pennsylvania
21 flight that American flies nonstop, but that's the only one
22 in control.

23 And by the way, we know that there's going to be
24 some differences between the treatment and the control
25 routes, because the routes that -- the routes that American

1 flies nonstop predominantly go to American hubs. And those
2 are cities that have a particular set of characteristics,
3 whereas the control groups are going to go to cities where
4 JetBlue flies that are not American hubs, and you might
5 expect those to have different characteristics. So let's
6 advance and just see how this plays out as these control
7 groups move into COVID.

8 The main thing you see straight away in the data is
9 that the treatment and control groups respond differently to
10 COVID-19. The red line on average is a good bit below that
11 blue line, between the onset of COVID-19 and the onset of the
12 NEA.

13 Now, in this analysis, JetBlue and American, in the
14 airline business, they have different ways to think about
15 which routes are business routes and which routes are more
16 leisure routes. I'm going to classify these routes using a
17 particular JetBlue document that just conveniently does, you
18 know -- works through all of these routes. And what that
19 document indicates is something like 80 percent of the
20 treated routes are designated as business, and it makes sense
21 because these are going to American hubs and American picks
22 those hubs for a reason. But only like 60 percent of the
23 control routes are business routes. And that's not a big
24 difference. It's a difference of 20 percentage points. But
25 it's -- it's seemingly enough to open up this difference

1 between the red and the blue lines. Or at least contribute
2 to the difference between the red and the blue lines.

3 And I pause at that as a potential explanation
4 because it's well known that COVID-19 affected business route
5 and leisure routes differently, with business routes taking
6 a bigger hit. And that's what you see here, is that the
7 different prices on the treated routes, which are more likely
8 to be business is sort of bigger than the hit on the control
9 routes on the price. Okay?

10 Can we go forward one slide?

11 So if we -- if I just take the analysis and do the
12 sort of -- look at changes over time on average, then what --
13 what I show in my reply report is that the control group
14 diverges from the treatment group during the COVID period,
15 by, on average, around minus 11 percent. In other words, the
16 treatment group goes down by 11 percent relative to the
17 control group. And that happens before the NEA is
18 implemented. All right. These data aren't in
19 Professor Carlton's differences, and the differences which
20 compares sort of the preperiod to the postperiod of the NEA.

21 But you can see that in Boston, the negative that
22 shows up in Professor Carlton's analysis actually sort of
23 predates the implementation of the NEA. And that's why --
24 that's why on the slide, I've got in that red arrow that the
25 causal interpretation is invalidated. It -- you know,

1 incidentally, this isn't just a matter of COVID. What this
2 is highlighting is that the treatment and control groups are
3 just different from each other. They respond to COVID-19
4 differently, but they're likely to respond to other changes
5 differently, as well. So looking at the response to COVID-19
6 is just a way to illustrate this particular setting that
7 there seems to be a discrepancy or a violation of the
8 assumption that you need in differences in differences. So I
9 don't think there's a meaningful interpretation of the
10 regressions that Professor Carlton has put forward.

11 Now, taking a step back, you know, if the
12 conclusion from this is that looking at the data, it's just
13 hard to isolate the causal effect of the NEA using the
14 information that we've got, then that's an agreement that
15 makes sense to me, and I would just add that -- you know,
16 I -- there are good reasons to think that that would be the
17 case, ex-ante, and that's sort of why I designed the analysis
18 that I did. But if the conclusion from -- you know, if
19 Professor Carlton's testimony is that the regression model
20 allows him to isolate the causal effect of the NEA, and it's
21 either a zero in New York or maybe a zero or a negative in
22 Boston, then that conclusion is incorrect, and it's not
23 supported by the data.

24 **Q.** Professor Carlton presented a comparison of your
25 predicted price increases to actual 2021 and 2022 prices.

1 What's your opinion of that analysis?

2 **A.** I don't think it's particularly helpful. You know, the
3 simulation result is going to predict the effects of the NEA
4 in 2019, holding everything else equal. Comparing that to
5 2021, 2021 realized data is completely the opposite in that
6 it conflates potential effects with the NEA with a number of
7 factors that the simulation holds constant, including COVID,
8 including changes to the traffic mix, including anything else
9 that changed in the world between 2019 and 2021 or 2022. And
10 so to me, it doesn't strike me as being an informer to the
11 way to assess how the model is performing.

12 **Q.** Some of defendants' experts have critiqued specific
13 aspects of your model. I want to start by talking about
14 marginal costs.

15 How do you respond to Professor Carlton's criticism
16 to marginal cost in your model?

17 **A.** Let me focus at a high level first and then maybe dig in
18 a bit. The distribution of marginal costs looks pretty good.
19 With no adjustments, only 12 percent of the products in the
20 NEA nonstop overlaps are negative. And I testified that
21 there's reasons to expect negatives, because you have this
22 unobserved revenue and fees and other sources, too.

23 Now, if that's the case, you might expect the ULCCs
24 to be particularly negative, because they get so much money
25 on their fees. And that turns out to be true, that in my

1 model 72 percent of the ULCC marginal costs are negative. So
2 it's consistent with my interpretation. If you pull out the
3 ULCCs, then only nine percent of the remaining products had
4 the negative marginal cost on the nonstop overlap.

5 Now, again, there are good reasons to think that a
6 model that is reliable and correct will generate that sort of
7 thing, that sort of prediction in a setting in which there's
8 unobserved revenue opportunities related to fees --

9 "unobserved" meaning not in the data -- you know, fees and
10 other profit opportunities of the sort that I've described.

11 To get a sense for some of this, I looked at
12 Department of Transportation Form 41 data. And this has data
13 at the carrier level -- okay, it's not broken down by route,
14 just sort of for American or for JetBlue. And that has
15 information on some of the fees. So they've got baggage fees
16 and change fees, and we can add that up. Okay. But it
17 doesn't include all the fees. It doesn't have seat fees.
18 Okay? That's the one that I spend the most money on. But
19 just with those fees, the average revenue for American is \$50
20 per passenger. All right.

21 And then there's these other things like the seat
22 fees, the loyalty credit cards, and so on, that the model
23 accounts for, but can make a marginal cost appear lower than
24 they might be.

25 And so again, my interpretation of this is that

1 overall, the distribution of marginal costs looks good, and
2 the model is performing the way I would expect it to perform.

3 **Q.** So as you suggested, let's dig in a little bit. I'm
4 going to show you slide 9 of the demonstratives that
5 Professor Carlton used. And I want to focus on the second
6 line, which is Boston to Charlotte. And if we can highlight
7 the American marginal cost.

8 Professor Carlton called out American's negative
9 \$111 marginal cost in his testimony. What's your response to
10 that?

11 **A.** First, let me just clarify that this marginal cost is not
12 adjusted in any way for any of the fees. First observation.

13 But the second observation is that Boston-Charlotte
14 is a route on which American and JetBlue have a combined
15 market share of 96 percent in 2019, according to revenue.
16 And that's exactly the sort of market where the model is
17 going to predict a high markup.

18 I think the model with that degree of market share
19 is stressed a little bit. You know, I testified this can
20 happen sometimes. So is the number exactly right? It's hard
21 to say for sure. But on the other hand, this is exactly the
22 sort of market where you'd expect to see a substantial price
23 effect.

24 And so just looking at the results of the model and
25 how it's performing in Boston and Charlotte, the results that

1 I obtained here are consistent with my understanding of
2 economics. You're talking about -- you're talking about
3 aligning the pricing incentives to two carriers that
4 collectively had 96 percent market share.

5 **Q.** I want to highlight the JetBlue postNEA fare and do the
6 same for Delta and United.

7 Dr. Carlton had noted that it would be strange for
8 JetBlue to charge higher prices than these two legacy
9 carriers. What is your response to that?

10 **A.** Well, I have two thoughts. One is that the NEA aligns
11 the pricing incentives of JetBlue with those of a legacy
12 carrier. It turns its pricing into those of a legacy carrier
13 as it maximizes its own profit. So it's not surprising that
14 you see a price of JetBlue of 781 that's now alining with the
15 price of American.

16 And as you pointed out, the markups on these
17 products are actually going to be equal to each other on
18 American and JetBlue, and that's metal neutrality playing out
19 in the model.

20 Now, the comparison to the Delta and United
21 products is, I think, not very informative, because in 2019,
22 the products here and the products that are in the model,
23 these are both connectors, not nonstop competitors.
24 Furthermore, they account for a combined four percent or less
25 of revenue.

1 **Q.** And let's talk about the percentage price change for
2 JetBlue's 153.5. How would you interpret that price change
3 for JetBlue?

4 **A.** Well, I interpret the model as indicating that on this
5 particular route, there's a large impetus for upward pricing
6 pressure. But this is one of those cases where the price
7 effect is so large that I think it could manifest in other
8 ways. And so one way that it could manifest, it's the
9 Nantucket-New York example that I gave you; it could just be
10 that JetBlue cedes the market to American and allows American
11 to handle the leg between Charlotte and Boston. That's one
12 way that this could play out that actually wouldn't involve
13 781 postNEA fare by JetBlue.

14 **Q.** There's been talk about certain Boston routes that are
15 carved out from the NEA. Why did you include those in your
16 analysis of Boston?

17 **A.** Well, I'm trying to provide useful information. If we
18 included the carve-outs, we get to the 428. If we don't
19 include the carve-outs, there's 224 in Boston, and I show the
20 results both ways.

21 Now, the -- I think it's unlikely that the
22 carve-outs are going to fully mitigate the loss of
23 competition, and so I have -- let me explain sort of my
24 thinking about this.

25 The first is that, you know, in the context of a

1 hub-and-spoke system, the -- the flights have to lineup. So
2 you've got to get passengers from one segment to the other
3 segment just to make all -- to make everything work on a
4 hub-and-spoke system. And in that setting, it seems
5 difficult to actually carve out routes that are, say,
6 Boston -- Boston to Syracuse or to Rochester in a way,
7 because the decisions that you make when you fly your routes
8 and how much you fly are just fundamentally intertwined with
9 the rest of the system. And so the notion that you can kind
10 of somewhat separate it out and not have it be affected by
11 NEA decisions just doesn't seem quite right to me.

12 The second observation is that the NEA may soften
13 competition between the defendants on these carve-out routes,
14 even in the absence of revenue sharing. And there are a
15 number of reasons to think that, but one of the ones that
16 I've already testified to is the history of -- of American
17 sort of acting in the spirit of a partnership or the spirit
18 of partnership of merging in the alliances or agreements that
19 American has had with other carriers.

20 And then the last observation is just that my
21 understanding is that the carve-outs can be modified or
22 eliminated at the defendants' discretion.

23 **Q.** Professor Carlton had noted that your model doesn't
24 reflect repositioning by other airlines to serve nonstop
25 overlaps. What's your response to that?

1 **A.** Well, I -- I don't think entry in repositioning are
2 likely to materially ameliorate competitive harm. And that's
3 just consistent with what I see in the documents and the
4 data, and it's consistent with my analysis of the industry.

5 We observe their sustained profitability
6 differences across markets and, you know, the only way to
7 rationalize that, as I understand it, is if there's barriers
8 to entry and repositioning. Otherwise -- otherwise entry in
9 repositioning would just come in and arbitrage away the price
10 differences.

11 But we see that the JetBlue effect happens, that
12 prices are high for a sustained period of time, until JetBlue
13 comes into the market. And that tells me that we had high
14 prices over a period of time that weren't competed away.

15 And the econometric analysis that I showed you
16 suggests that routes that have fewer legacy competitors have
17 systematically higher prices than routes that have more
18 legacy competitors. And that's, again, consistent can with
19 these sustained differences.

20 In the NEA markets in particular, we've got these
21 gate and slot constraints, and those are relevant on their
22 own as hard to get into those markets. But they also amplify
23 an opportunity costs. And we'll take Delta. If you're Delta
24 and you've got a gate already, say, out of JFK, and you're
25 going to switch it, so this sort of arbitrage thing, then

1 there's a real opportunity cost, because you can't
2 necessarily just add a plane; you've got to move a plane from
3 one market to another. And there's a reason that you've
4 picked that first market. Presumably, it's because that's
5 your preferred market, and you're earning the most money
6 there. So these sort of opportunity costs, especially an
7 accommodation of the gate and slot constraints, gives me a
8 concern about whether the sort of entry or repositioning
9 thing would ameliorate harm.

10 The other observation is, in this context, there's
11 no obvious replacement for JetBlue. JetBlue is a little bit
12 of unicorn in the space. I mean, it's got high quality; we
13 know that. It's got a low-cost structure; we know that.
14 That allows it to compete aggressively on price but also
15 provides a product that's compelling, that can attract
16 customers away from the legacies. And there's not a lot of
17 other carriers that do that, particularly, I mean -- you
18 know, particularly in the Northeast, but actually, I don't
19 know if even broader than that.

20 Dr. Israel characterized Delta and maybe even
21 United as a rapid entrant, and this is sort of an entrant
22 that might be in a hub. It can just switch routes around.
23 I'll just observe that in 2019, Delta was already in 23 of
24 the -- 23 of the 29 NEA nonstop overlap markets, and so I
25 don't think characterizing it as rapid entrant is really

1 appropriate, because Delta is already there. And my analysis
2 take that is into account.

3 In fact, Delta gains from the price elevations that
4 we see from the model. Because when the prices go -- as
5 American and JetBlue raise price, customers switch to Delta.
6 Delta can raise its price, too. And it gains a lot of
7 passengers. And so this is actually a really nice thing for
8 Delta. And the model allows Delta to expand in a way that's
9 profit maximizing for it. So the notion that Delta is a
10 rapid entrant to me seems a little bit misguided.

11 But the same is also true for United. United does
12 not have a hub in Boston, JFK, or LaGuardia. It does have a
13 hub in Newark. So if you were to include Newark, the
14 observation would be that it's already in all but one of the
15 nonstop overlaps. So again, United as an entrant doesn't
16 make sense to me in this content.

17 MR. DERITA: So I have about 15 minutes left, or
18 so. We could push through or take the break.

19 THE COURT: Take the break now. Thanks.

20 (Court in recess at 11:04 a.m.

21 and reconvened at 11:16 a.m.)

22 THE COURT: Go ahead.

23 MR. DeRITA: Thank you.

24 BY MR. DeRITA:

25 Q. So, Dr. Miller, there's been talk about academic

1 literature that attempts to look at price effects of recent
2 legacy airline mergers. Do you consider that literature a
3 proper point of comparison for the results of your model?

4 **A.** Well, I mean, I think it makes sense to benchmark the
5 model against comparable events to try to have some notion
6 for whether the market -- whether the model is generating
7 predictions that are reasonable.

8 I have reservations about comparing it to the
9 recent legacy mergers, and the reason is that those mergers
10 were cleared by the enforcement agencies either because
11 there's a low risk of anticompetitive effects -- and that
12 would be the case for Delta-Northwest -- or because they were
13 cleared by the Department of Justice after remedies that are
14 intended to reduce the effects of anticompetitive effects --
15 and that would be the case United-Continental and
16 US Air-American.

17 And, you know, this notion that we should take
18 seriously the decision that the enforcement agency made or
19 the remedies that they obtained and sort of -- it's not
20 something that's, like, unique to my viewpoint.

21 I put two quotes on the board. One is from
22 Dr. Werden, who was the senior economic counsel at DOJ for
23 many years. And he just points out that merger
24 retrospectives, you know, using them to test specific
25 allegations in the vast majority of -- well, I won't read it.

1 My eyes are tired.

2 But on the right, in a different context,
3 Professor Carlton points out that if you're looking to assess
4 whether mergers have raised price, you know, you're looking
5 at sort of a selected sample of mergers that have been
6 cleared, and that that sort of should affect how you
7 interpret it.

8 And so I think this is -- is somewhat of a
9 straightforward observation. And it's independent of other
10 just, you know, general methodological challenges that arise
11 with isolating a the competitive effects as they arise in
12 markets.

13 **Q.** There's been some suggestions that your projected
14 route-level price increases are much higher than what's been
15 found in academic literature. How would you respond to that?

16 **A.** Well, keep in mind, the academic literature, you know
17 what it estimates -- and Professor Carlton explains this
18 too -- is it estimates the average effects and -- because,
19 when we use econometrics, we can use different data points
20 and get an average.

21 And so -- so what the study is reporting, in any
22 academic study that I know of, is sort of the average effect
23 of something that -- you know, as it plays out in a market.
24 Okay? And, you know, whereas the model is -- predicts route
25 level.

1 And so I think, you know, if we're comparing the
2 literature, the right thing to be comparing is the average
3 effect of -- that I've obtained across these -- across the
4 nonstop overlaps to, you know, the average effect that would
5 be obtained in the academic literature.

6 There is an ability to go route by route, but it's
7 not something that's been done in the literature. I've used
8 an ordinary course study of the JetBlue effect, and that's
9 what I've talked to you about before.

10 **Q.** So you kind of mentioned this, but what studies would
11 allow you to compare route-by-route results of your model?

12 **A.** I've mentioned before I testified that the distribution
13 of price effects that I get in the simulation model are
14 comparable to the distribution of price effects that are
15 obtained from JetBlue's ordinary course analysis of the
16 JetBlue effect.

17 And just to give you a visual of that, I've
18 interspersed the two with the JetBlue effect in blue and the
19 simulation effect for the different NEA nonstop overlaps in
20 red to show that, indeed, these two are overlapping.

21 Now, Professor Carlton mentioned that the entry of
22 JetBlue is different than the NEA, and I agree with that.
23 You know, entry of -- our next event is different than a
24 revenue-sharing agreement. But Professor Carlton didn't
25 contest the economics that I laid out that explained why the

1 price effects are going to be similar across those two.

2 And on the direct, I sort of walked you through the
3 line of argument that says, you know, the incentives are
4 slightly different; but in general, we're going to get -- you
5 know, either one is reducing -- removing an independent
6 competitor from the market. And so it's a useful
7 benchmarking, and it's a standard benchmarking that's done in
8 this sort of setting.

9 **Q.** Let's turn back to average price increases. Are there
10 any econometrics that you would be able to compare your
11 average price increases from your model to?

12 **A.** There are. I've put four on this chart, and these are
13 the four that I think provide the best benchmarking of
14 average effects. The average effect of my simulation result
15 is 9 percent.

16 On the left in the light blue, we have the
17 defendants' advocacy work that attempts to estimate the
18 average effect of JetBlue competition in markets, and that
19 comes in around 20 percent.

20 And then we have the two econometric studies that I
21 provided, one of which, the higher bar, around 13 to
22 15 percent, is the effect of an additional legacy competitor
23 on a route; and then the somewhat lower bar is the effect of,
24 you know, the reduction of competition from American with the
25 737 MAX grounding that led JetBlue to raise price.

1 And so, again, and across these different
2 benchmarks, the simulation model, on average, appears
3 reasonable.

4 **Q.** How does your average predicted price increase compare to
5 the academic literature looking at prior airline mergers?

6 **A.** I have reservations about looking at many of these
7 mergers for reasons that I laid out; but if you put them in,
8 there, you get a distribution with some above and some below.
9 And these are individual mergers.

10 So, for example, the Peters paper that was
11 discussed at considerable length looks at five mergers; and
12 there's five different dark blue lines for that. You can see
13 the Carlton results for the three legacy mergers over on the
14 right. But, you know, interpreted in overall here, the
15 simulation results I get, again, are somewhat in the middle
16 here.

17 **Q.** So, Dr. Miller, just to wrap up what are the key
18 takeaways from your testimony?

19 **A.** I mean, I think the most important thing is that the NEA
20 effectively ends competition between American and JetBlue on
21 routes that touch NEA airports, and it does that because it
22 aligns the pricing incentives, and it allows them to make
23 capacity decisions that are in their mutual joint interest.
24 And that's what I mean by effectively ends competition on
25 these airports.

1 And so -- and so then the economic question
2 because, you know, what does it mean for consumers to have a
3 competition end between these two, between these two
4 competitors? And that's where I've done a fair amount of
5 work that shows that competition matters in these markets.
6 It leads to lower prices.

7 I've analyzed the revenue-sharing terms that are in
8 the MGIA and the NEA, and I, you know, analyzed those in the
9 context of the markets on which JetBlue and American compete.
10 And I show that the incentives are aligned. It creates
11 incentives for price increases. It potentially puts the
12 JetBlue effect at risk as JetBlue's incentives changed.

13 You know, I've quantified this in the particular
14 context of the Bertrand model and obtained harm of
15 696 million. What I've tried to explain in the model is, you
16 know, this is really just about what the implication of a
17 loss of competition is. And it's not an effect that's
18 peculiar to this -- this specific model, because I obtained
19 similar, even larger effects with other models. And so it's
20 just an illustration of, you know, why competition matters,
21 and here it's a big effect.

22 And so, ultimately, that's my opinion and that I
23 reach in my analysis.

24 MR. DeRITA: Thank you, Dr. Miller.

25 Your Honor, I'll pass the witness.

1 THE COURT: All right. Cross-examination.

2 MR. WALL: Yes, Your Honor. Thank you.

3 **CROSS-EXAMINATION BY COUNSEL FOR AMERICAN AIRLINES**

4 BY MR. WALL:

5 Q. Good morning, Dr. Miller.

6 A. Good morning.

7 Q. At 10:56 a.m. this morning, you said that the Northeast
8 Alliance turns JetBlue's pricing incentives into those of a
9 legacy carrier. Are you willing to have Judge Sorokin
10 evaluate your credibility on this case based on that
11 assertion?

12 A. Yes.

13 Q. Okay. Great. You began by talking about -- by putting
14 up a slide, slide 4.

15 MR. WALL: If we can put that up from his -- not --
16 no. Put up his original, sorry, slide 4.

17 BY MR. WALL:

18 Q. That is talking about how the NEA leads to significant
19 harm for Boston passengers. And you -- you have your bar up
20 there that goes in dark blue up to \$428 million. Do you see
21 that?

22 A. Yes, I do.

23 Q. I've broken that bar down in a -- in some something we
24 put together while you were testifying to distinguish between
25 the carve-out routes and the noncarve-out routes. And as you

1 can see here, the estimated harm for the Boston passengers
2 drops from 428 to 225 million, correct?

3 **A.** I provided this in the report.

4 **Q.** Is that correct, sir?

5 **A.** I don't remember, but I could look at -- it's
6 qualitatively right that the carve-out -- without the
7 carve-out routes, you would be in that ballpark. I just
8 don't know if the number is exactly the number that was on my
9 exhibit.

10 **Q.** Okay. So 203 million out of the estimated \$428 million
11 in harm comes from routes on which the parties are not
12 sharing revenue and they are not coordinating capacity,
13 correct?

14 **A.** That is correct.

15 **Q.** And that is notwithstanding the fact that these are the
16 results of a merger simulation model that depends on there
17 being revenue sharing and capacity coordination, correct?

18 **A.** I would clarify that it's not a merger simulation model,
19 but a simulation of the NEA. But the model does implement
20 revenue sharing along those routes.

21 **Q.** Okay. So -- so the mechanism that leads to the harm
22 under your simulation model is not actually present on the
23 Boston carve-out rights -- routes, correct?

24 **A.** The particular mechanism is not.

25 **Q.** Okay. Well, there's no other mechanism that's working in

1 your model, right?

2 **A.** That is the mechanism in the model.

3 **Q.** Okay. All right. Let's -- let's talk briefly about the
4 issue of market definition. So let's pull up slide 6 from
5 your original -- from your slide deck today. And you have
6 this -- this line here that says the horizontal merger
7 guidelines pose a simple question. Do you remember this one?

8 **A.** Yes, I do.

9 **Q.** It's not the only question that the horizontal merger
10 guidelines pose with respect to market definition, however,
11 is it?

12 **A.** Well, I think this is just a description of the
13 hypothetical monopolist test, so I take it as the one that's
14 the most relevant.

15 **Q.** Okay. Well, let's -- again, we put this together while
16 you were testifying. This one talks about another part of
17 the market definition section of the horizontal merger
18 guidelines, which makes a simple point that, "When the
19 geographic market is defined based upon supplier locations,
20 sales made by suppliers located in the geographic market are
21 counted, regardless of the location of the customer making
22 the purchase."

23 You recall we discussed that principle when you
24 testified previously, right?

25 **A.** Yeah. My model does this.

1 **Q.** Okay. In fact, when you saw this principle during your
2 testimony when you were here last time, you were surprised
3 that this principle existed, were you not?

4 **A.** No, I disagree.

5 **Q.** You didn't even know about it until I raised it in
6 cross-examination, did you?

7 **A.** That's incorrect.

8 **Q.** Let's look at the circle principle that you have -- of --
9 talked about in your examination. What is the closest
10 substitute to a nonstop flight to JFK airport in New York
11 City from Los Angeles International Airport, or LAX?

12 **A.** Most often, it's another nonstop at JFK.

13 **Q.** And after that, what is the next closest substitute?

14 **A.** That's not something that I've quantified.

15 **Q.** You don't know that it is a nonstop flight to Newark?

16 **A.** No economist has quantified that in the context of
17 this -- of this trial, to my understanding.

18 **Q.** Okay. So let's get this. All right. Is it your
19 testimony that, after two years of work on this case, you
20 don't have an opinion as to whether the next closest
21 substitute to a nonstop flight between Los Angeles and JFK is
22 a nonstop flight between Los Angeles and Newark? Yes or no?

23 **A.** I'm just trying to -- I know my answer, except I'm trying
24 to remember the question.

25 Is it my testimony that I don't know? The answer

1 is yes, I believe.

2 **Q.** You don't -- you don't have an opinion on that?

3 **A.** I don't have an opinion on whether -- I haven't examined
4 quantitatively whether a nonstop flight from Newark is a
5 closer substitute than a connect out of LaGuardia.

6 **Q.** That's not what the question was, sir. I said do you
7 have an opinion or not whether the next closest substitute to
8 the JFK service between New York and Los Angeles is the
9 Newark service between New York and Los Angeles, yes or no?

10 **A.** As a general matter, it's a hard question because
11 conditions are going to vary across routes. There might be
12 instances in which there's a good answer and a clear answer.
13 As a general matter, I don't have a good answer. I don't
14 know.

15 **Q.** Okay. You made some comments about Professor Brueckner's
16 testimony. Could you remind us again of the citation to your
17 published article on airline market definition? You don't
18 have an article -- a published article on airline market
19 definition, do you?

20 **A.** No. I haven't written on the subject in my academic
21 work.

22 **Q.** Professor Brueckner has, correct?

23 **A.** Yes, he does have an article on it.

24 **Q.** His article is entitled "City-Pairs Versus Airport-Pairs:
25 A Market-Definition Methodology For the Airline Industry,"

1 correct?

2 **A.** I will take that as true.

3 **Q.** Okay. And for all you quarrel with the methodology, you
4 agree, do you not, that the updated results of his
5 methodology indicate that Newark, LaGuardia, and JFK should
6 be grouped together in one market? Correct?

7 **A.** I agree with -- I disagree with the term "should" in that
8 context. I agree that that's the result of the test as -- as
9 it's been implemented by Professor Brueckner.

10 **Q.** Well, in fact, that's true even after the modifications
11 to the methodology that you made and reported on in your
12 reply report, correct?

13 **A.** That's correct.

14 **Q.** And you showed that, for eight of nine different
15 specifications, the methodology by Drs. Brueckner, Lee, and
16 Singer would indicate a three-airport grouping, correct?

17 **A.** I don't remember the details. It's not particularly
18 informative.

19 **Q.** Okay. And at the end of the day, you keep coming back to
20 the hypothetical monopolist test, right?

21 **A.** That is the way I think about markets.

22 **Q.** Right. But every combination of New York City
23 airports -- one airport, two airports, three airports --
24 passes the hypothetical monopolist test, correct?

25 **A.** That's not something that I've looked into, but I think

1 my groupings make sense.

2 **Q.** Well, you are aware that -- that Dr. Israel established
3 that LaGuardia alone would pass the hypothetical monopolist
4 test, correct?

5 **A.** Yes. I believe he submitted that as -- yes.

6 **Q.** And you acknowledged in your prior testimony that the
7 three-airport cohort would pass the hypothetical monopolist
8 test, correct?

9 **A.** Specifically in the context of JFK to Phoenix, I believe.
10 Is -- could you clarify your question?

11 **Q.** Sir, you -- you brought this up at your deposition to
12 tell me that the three-airport cohort would pass the
13 hypothetical monopolist test, right?

14 **A.** Yes.

15 **Q.** Okay. So there's no doubt that it does, right?

16 **A.** Yes.

17 **Q.** Okay. Okay. Now, let's pull up your slide -- I'm not
18 quite sure the number here. Sorry. It's on importance.
19 It's Number 5.

20 Okay. You put this slide up to say defendants make
21 a big deal out of Newark, but its treatment has a relatively
22 small effect on total harm. And in this comparison, what
23 you're comparing is the -- the difference in the estimated
24 harm with or without Newark to your total estimate of harm,
25 including Boston, right?

1 **A.** Yes.

2 **Q.** The market definition issue about New York is irrelevant
3 to Boston, right?

4 **A.** That's true except for one route.

5 **Q.** Right. And the approximately \$70 million change in the
6 estimated harm is out of about 200 million in estimated
7 New York City harm, right?

8 **A.** I don't know what it's out of. It's -- 70 million is
9 70 million, so we can -- you can put it -- compare that to
10 whatever you want, but that's the number.

11 **Q.** Dr. Miller, are you saying you took the time to compare
12 it to the combination of New York and Boston, and you don't
13 know what it compares to the -- New York itself?

14 **A.** No, that's not what I'm saying.

15 **Q.** Well, do you?

16 **A.** New York is, you know, somewhere -- it's about roughly --
17 yes. The answer is yes, I do know.

18 **Q.** And what is it?

19 **A.** It's roughly 30 percent of the harm in -- out of the
20 New York City markets. I believe I should -- I should check
21 that, but it's -- the numbers are -- I think I gave numbers
22 on the testimony that breaks out harm between New York and
23 Boston. And so we can compare the 70 million against the
24 numbers that I gave --

25 **Q.** Okay.

1 **A.** -- on direct testimony.

2 **Q.** And the reality is, while you criticize defendants for
3 making a big deal out of this, if you include Newark and
4 United and the other airlines that are flying from Newark in
5 the relevant markets, your own methodology is estimating
6 price increases on 14 of 18 New York City routes at less than
7 5 percent before taking into account any benefits or downward
8 pricing pressure, correct?

9 **A.** Could you clarify what you mean by "price effect"? Is
10 this the price effect on JFK -- excuse me -- on American and
11 JetBlue, or is this the price effect across all --

12 **Q.** All products.

13 **A.** Oh. Well, that is not particularly relevant. I don't
14 have a particular memory of that result.

15 **Q.** Your -- you just said, like out loud, that your estimated
16 price increase for all products in the relevant market is not
17 relevant?

18 **A.** Two distinctions. One is I don't think it's the relevant
19 market; and the second, if you would like me to explain what
20 I mean by that context, I'd be happy to.

21 **Q.** That's fine. If your counsel wants to ask you about it,
22 they will.

23 So you made another point criticizing Dr. Israel
24 for not having -- conducting a full competitive analysis of
25 the various nonstop overlap routes that are affected by the

1 NEA. But let's be clear -- what your competitive analysis
2 has been is to treat them like a merger, to sum up the market
3 shares, to square them, and then to apply them against the
4 guidelines for presumptive illegality of mergers, right?

5 **A.** That's an incomplete characterization of how I developed
6 the evidence.

7 **Q.** That is a correct statement of part of your analysis,
8 correct?

9 MR. DeRITA: Objection. He just testified that
10 this is mischaracterizing what he did.

11 THE COURT: Overruled.

12 THE WITNESS: That is part of what I do.

13 BY MR. WALL:

14 **Q.** Okay. And, in fact, you do not undertake and report any
15 route-level analysis of competitive conditions, entry
16 conditions, or possibility of expansion by other carriers for
17 any of the nonstop overlap routes, do you, sir?

18 **A.** I think I provide a number of competitive characteristics
19 across all the routes.

20 **Q.** I said route by route, sir.

21 **A.** Exactly. Route by route, the appendices of my report, I
22 included a number of statistics on prices and quantities and
23 shares, route by route. Not only for the nonstop overlaps,
24 but I think the information is there, as well, for the mixed
25 overlaps and the connect overlaps.

1 **Q.** But, for example, on this question, you went out of your
2 way to make a point that it wouldn't be proper to think of
3 United or Delta on these routes as rapid entrants, because
4 they're already on the -- the routes. Do you recall that?

5 **A.** Yeah. Delta in particular is -- competes on many of
6 these routes.

7 **Q.** Right. So with respect to Delta, we don't have to worry
8 about entry. They're already there, right?

9 **A.** I don't understand the context of the question.

10 **Q.** Well, there's --

11 **A.** Entry remains relevant.

12 **Q.** Of course it does, but we don't have to worry that Delta
13 enters a route that it's already on, do we, sir?

14 **A.** I don't know the context of the question. I -- it's
15 relevant that Delta competes on the routes, and my analysis
16 takes that into account.

17 **Q.** Right. Once someone is already there, the antitrust
18 analysis turns to the question of whether there are barriers
19 to expansion rather than barriers to entry, correct?

20 **A.** There are cases where expansion can be profitable and the
21 model includes some of that.

22 **Q.** I didn't ask you about anything about your model, sir.
23 In the antitrust analysis, with respect to firms that are
24 already in the relevant market, a question we ask is whether
25 there are barriers to expansion, yes or no?

1 **A.** That can be relevant.

2 **Q.** Okay. And you have not conducted any route-level
3 analysis of barriers to expansion by United, Delta, or any
4 other carriers in this case, have you, sir?

5 **A.** I would disagree with that.

6 **Q.** Where -- where do I find it? Pull it up in your report.

7 **A.** You could actually put a demonstrative on the slide where
8 I do entry and repositioning here on direct.

9 **Q.** Route level?

10 **A.** All of the routes --

11 **Q.** No, at route level, sir. Not anything that's combined in
12 the aggregates.

13 **A.** If you would like me to try to explain, I could.

14 **Q.** I want you to tell me whether you did a route level
15 analysis --

16 **A.** I've already explained that the answer is yes, as I
17 interpreted, and I can explain if you wish, but if you don't
18 want me to explain, I can just move on.

19 **Q.** Which demonstrative are you wanting to put up?

20 **A.** The entry and repositioning.

21 **Q.** From today?

22 **A.** Yes.

23 MR. WALL: Do we know which slide that is?

24 MR. DeRITA: 37.

25 MR. WALL: 37?

1 Can you put slide 37 up?

2 THE WITNESS: Every single -- do you want me to
3 answer now?

4 BY MR. WALL:

5 Q. Yeah, go ahead.

6 A. Every single one of the routes involved flies out of an
7 airport that is, in the case of Boston, gate constrained or
8 slot constrained. And so any sort of repositioning involving
9 moving flights or increasing the number of flight creates an
10 opportunity cost that, all else equal, is going to make --
11 there's going to be -- trade that off against any
12 repositioning. That's one of the reasons I think
13 repositioning is unlikely here.

14 And I cannot say that this is route by route
15 because it applies to all of the routes in the analysis,
16 every single one of them.

17 Q. Okay. So let's just go ahead and run with this. I
18 mean -- so let's say, first of all, for the record, slide 37
19 of your demonstrative here is your route-level analysis of --
20 of repositioning and barriers to expansion by existing
21 carriers, right? That's what we got?

22 A. It covers all of the routes.

23 Q. Okay. And what you're saying here is you don't think
24 that, for example, if JetBlue and American were trying to
25 reduce capacity and raise prices on the Boston-to-DCA route,

1 that Delta, which currently is running eight times a day with
2 small regional jets, wouldn't and couldn't upgauge in order
3 to try to compete away that attempted exercise in market
4 power? That's your opinion?

5 **A.** They might do some of that.

6 **Q.** Okay. Great. Let's move on, then.

7 Now, when you were talking about Dr. Israel's
8 discussion of the MGIA, did I hear you say that you thought
9 he was addressing a special case where capacity lowers RESM?

10 **A.** No. That would be an incorrect characterization of my
11 statement.

12 **Q.** So if you used the phrase "special case where capacity
13 lowers RESM," you misspoke?

14 **A.** I could -- if there's a question about -- maybe if you
15 put my testimony on the screen, I could clarify --

16 **Q.** I'm afraid I'm not going to be able to do that, sir. But
17 let me just -- let's just get it out here.

18 Are you contesting that in airline economics, the
19 normal case is that RESM will go down when capacity is added
20 to a market?

21 **A.** All else equal, that would be the effect we obtained to
22 some degree.

23 **Q.** Great. Let's move on. And let's -- let's talk about
24 your -- your simulation.

25 So just to remind everybody, when you were here

1 last time, you testified that, for the nonstop overlap
2 routes, the simulation you run produces results that are,
3 quote, "almost identical to a full merger," end quote,
4 correct?

5 **A.** Could you -- I don't recall the details of my statements,
6 so --

7 **Q.** You had it on a slide --

8 **A.** Oh, okay.

9 **Q.** -- where you broke the --

10 **A.** Could you put the slide on the screen?

11 **Q.** No, sir. I'm not going to take the time to do that. Do
12 you have a problem accepting --

13 **A.** So --

14 **Q.** -- the proposition that you are predicting adverse
15 effects for the nonstop overlap routes that are almost
16 identical to a full merger between American and JetBlue?

17 **A.** A full merger -- I think that that is -- the results that
18 I'm obtaining in the model, particularly for the nonstop
19 overlaps where almost all the traffic is in scope, would be
20 similar to the results that would obtain under an alternative
21 model in which there's full profit sharing in the model.

22 **Q.** Okay. For the record, you testified -- you put up a
23 slide that had the quote that I mentioned, but we'll move on.

24 **A.** Okay.

25 **Q.** So that simulation models the upward pricing pressure of

1 a unilateral effects merger without regard to any downward
2 pricing pressure or consumer benefits, right?

3 **A.** To clarify, it's the upward pricing pressure of the NEA,
4 but the model does not incorporate any possible efficiencies
5 that would be relevant. It quantifies the anticompetitive
6 side of the effect.

7 **Q.** The upward pricing pressure is -- is the same recapture
8 effect, as you described it, that we use in analyzing
9 unilateral products mergers, unilateral effects mergers,
10 correct?

11 **A.** Often it -- often UPP -- often that's the case.

12 **Q.** Yes. So your simulation model doesn't take into account
13 and model any output expansion facilitated by the NEA,
14 correct?

15 **A.** That is correct. It holds capacities fixed.

16 **Q.** Okay. So let's put up DX-1087, which was presented in
17 Mr. Znotins's testimony the other day. You're familiar with
18 this?

19 **A.** You know, actually, I haven't seen this before.

20 **Q.** Okay. Well, I'll represent to you that this is a list
21 that Mr. Znotins sponsored of new New York City routes since
22 the implementation of the NEA. Can you accept that for me
23 for purposes of the question?

24 **A.** Yes.

25 **Q.** Now, assuming that this is all true, your model will not

1 take into account any capacity expansion that is attendant to
2 these new New York City routes, correct?

3 **A.** That's correct.

4 **Q.** Okay. And if we go to the next one, it's the same slide
5 for Boston. You'd give me the same answer, correct?

6 **A.** Yes.

7 **Q.** Okay. There's been testimony in this case about
8 approximately 30 aircraft that JetBlue is adding to its fleet
9 because of the NEA. Assuming that testimony is true, the
10 capacity effects of that would not be reflected in your model
11 in any way, shape, or form, would it?

12 **A.** Excuse me. I have to hiccup or something.

13 That's correct.

14 **Q.** Okay. If Robert Isom, Vasu Raja, and Brian Znotins are
15 correct when they testified that the NEA will justify
16 additional investment in American Airlines' fleet, the
17 benefits of that are not going to be reflected in the results
18 of your model, correct?

19 **A.** That's right, for the same reason.

20 **Q.** Your simulation results do not take into account
21 increased customer utility from more frequencies or better
22 schedules facilitated by the NEA, correct?

23 **A.** That is true. I think those effects are highly
24 ambiguous.

25 **Q.** But that is -- even though -- in your nested logit model,

1 you assumed that consumers put a valuation on the number of
2 frequencies offered by a carrier and its partners per quarter
3 on the routes in question, correct?

4 **A.** Yes. Consumers benefit from frequency in the context of
5 the model.

6 **Q.** Right. And, in fact, Dr. Israel put forth an analysis in
7 his report showing that the frequency benefits alone implied
8 by your model were greater than your estimates of harm,
9 correct?

10 **A.** He didn't testify to that.

11 **Q.** It's in his report, is it not, sir?

12 **A.** It is in his report.

13 **Q.** And the reports are now in evidence.

14 MR. DeRITA: Objection.

15 THE COURT: He may not know. Sustained as to that
16 question.

17 MR. WALL: Okay.

18 BY MR. WALL:

19 **Q.** But you did not reduce your estimates of harm that you
20 reported that lead to \$696 million figure by so much as a
21 penny to account for the consumer value of greater
22 frequencies, did you?

23 **A.** That's right. I can explain.

24 **Q.** Excuse me, sir. That's -- you've answered the question.
25 We can move on.

1 You heard Mr. Schweinzger's testimony about the
2 improvement in American and JetBlue's QSI scores since the
3 NEA went into effect, right?

4 **A.** I don't recall that.

5 **Q.** Do you know what QSI is?

6 **A.** I think we talked about this on cross last time.

7 **Q.** Okay.

8 **A.** Quality score index?

9 **Q.** Yes. Quality of service index. Close enough.

10 Let's put up a slide from Mr. Schweinzger's
11 demonstratives. It was slide 12. Have you seen that before?

12 **A.** No, I have not.

13 **Q.** Okay. In all events, your simulation would not take into
14 effect or model the parties' improved QSI, would it, sir?

15 **A.** I don't know what that means.

16 **Q.** Okay. In fact, in your estimates of harm, there's no
17 reflection whatsoever of the consumer benefits of the new
18 international flying facilitated by the NEA, is there?

19 **A.** In the model, the model focuses on domestic traffic;
20 therefore, it does not incorporate changes for good or bad on
21 international routes.

22 **Q.** Okay. Let's bring back Defendants' Exhibit 238. And
23 this has some redactions, so we'll be publishing the redacted
24 version.

25 Are you familiar with this document that Delta

1 prepared on the New York City 2021 competitive landscape?

2 **A.** I've read a lot of documents. I may have read this one
3 as well. I don't remember it specifically.

4 **Q.** Well, let's put up page 2 of the document, and perhaps
5 this -- this will refresh your recollection. This is -- this
6 is the document in which Delta says that the NEA is creating
7 one relevant competitor out of two weak ones. Do you recall
8 that one?

9 MR. DeRITA: If I may, we don't have a binder of
10 these documents.

11 Do you have copies?

12 MR. WALL: Sorry.

13 THE WITNESS: This document says -- wait. Is there
14 a question, or should I wait here?

15 MR. WALL: Just wait.

16 Take that down.

17 BY MR. WALL:

18 **Q.** Okay. So -- oops. Excuse me.

19 All right. Let me direct your attention to
20 something that -- a line that says "AA partnership emboldens
21 B6 to add new business spokes to its JFK/LaGuardia portfolio
22 and to accelerate growth in EWR to 85 plus departures."

23 Do you see that?

24 **A.** Yes, I do.

25 **Q.** Okay. Now, if Delta's assessment's correct, that ought

1 to create consumer benefits, right?

2 **A.** I don't know the particular context that this is
3 discussing. For example, if this is just about swapping
4 JetBlue planes for -- or swapping JetBlue planes for American
5 planes in LaGuardia, some of that -- it's hard to analyze
6 without knowing more about --

7 **Q.** Forget netting for a moment. Just --

8 **A.** Excuse me?

9 **Q.** Forget trying to net them by something else that I'm not
10 asking you about. If I just ask you to assume that the NEA
11 emboldens JetBlue to add new business spokes to its
12 JFK/LaGuardia portfolio and to accelerate growth in Newark,
13 that should create consumer benefits, correct?

14 **A.** Well, I think the net is important here.

15 **Q.** No, I didn't ask you about the net. If your counsel
16 wants to ask you about the net, they will.

17 That should create consumer benefits, correct?

18 **A.** It's complicated.

19 **Q.** Regardless whether it -- whether it creates consumer
20 benefits or net consumer benefits, neither is going to be
21 reflected in your model, correct?

22 **A.** The model holds capacity fixed, and so the capacity
23 changes are not in the model.

24 **Q.** Right. So the answer to my question was yes. Right?

25 **A.** Yes.

1 **Q.** Okay. Now, let me -- look at our line on page 4 of the
2 document. It says, "AA will transfer underutilized slots to
3 constrained B6, realigning partnership capacity to each
4 carrier's strengths and facilitating B6 growth beyond 2019
5 levels."

6 Now, if that has an effect on capacity, that won't
7 be reflected in your model either, correct?

8 **A.** If it has an effect, it's not in the model.

9 **Q.** Okay. The last time we were here, we discussed how you
10 had come to testify after two years of work without any
11 evidence of actual harm from the NEA. Are you still in that
12 position as you testify today?

13 **A.** I think there's harm. There's lots of evidence that the
14 NEA creates harm.

15 **Q.** Okay. Let's go through it. Can you identify for me what
16 you believe is the most significant single case of actual
17 harm that has been created by the NEA?

18 **A.** Well, this is a different question now --

19 **Q.** The --

20 **A.** -- increased in particular markets. I've not sought to
21 show that.

22 **Q.** Let me just -- I'll say it again. Can you identify for
23 me what you believe is the most significant single case of
24 actual harm to date created by the NEA?

25 **A.** No. I won't identify that. Is that the question, is

1 will I?

2 **Q.** Yes. Can you?

3 **A.** No. Can I?

4 **Q.** It's a challenge, sir. Are you able to do that?

5 **A.** I don't believe that we can isolate the causal effect of
6 the NEA in the data as we've seen it.

7 **Q.** Okay. Now, you mentioned before that you think that the
8 reasons for that are COVID-19, litigation risk, and partial
9 implementation; but let's just kind of go through those. For
10 all you criticize Dr. Carlton, you didn't even try to work
11 with the postimplementation data to see if you could come up
12 with control groups that would adequately isolate the fare
13 effects of the NEA, did you?

14 **A.** First of all, a clarification, the problem is -- on the
15 second one, it's not simply COVID, but it's that COVID
16 amplifies the normal methodological problems that are
17 associated with teasing out causality of events like this.

18 **Q.** Terrific. Back to my question. You never even tried in
19 the course of your two years of study to come up with control
20 groups that would adequately isolate the fare effects of the
21 NEA, did you?

22 **A.** That's correct.

23 **Q.** Okay. So you brought up this point about the distinction
24 between business and leisure passengers, but you didn't try
25 to come up with different business or leisure passenger

1 control groups to see if that made a difference, did you?

2 **A.** That's true. I didn't try to do that.

3 **Q.** Okay.

4 MR. WALL: Can we put up his slide 31, please.

5 BY MR. WALL:

6 **Q.** Now, in this slide, you went into an explanation about
7 how the -- there's a pretty significant divergence between
8 the blue line and the red line in the period of 2020, right?

9 **A.** Yes, I did.

10 **Q.** Okay. And Professor Carlton doesn't use 2020 in his
11 difference-in-difference regressions, correct?

12 **A.** In the baseline specification, it is not included.

13 **Q.** Okay. Right. He runs -- he runs a test where he
14 includes it to see if it makes any difference, but in the
15 baseline specification, it's not there, right?

16 **A.** It's -- that test doesn't conclude -- you can't reach
17 that conclusion from the -- his test. It's an inappropriate
18 test.

19 **Q.** Okay. In all events here, by approximately January or
20 February 2021, the red and blue lines are back together,
21 right?

22 **A.** Yes.

23 **Q.** Do you have data after February or January 2021 to show
24 us whether they moved together after that?

25 **A.** Data are available.

1 **Q.** You just decided not to report them?

2 **A.** It wasn't relevant for the point I'm making.

3 **Q.** Okay.

4 **A.** I know roughly what they look like, and I could explain
5 that to you like.

6 **Q.** Sir, so are you prepared to testify here today that
7 analyzing data from 2022 or 2023 won't permit a reasonable
8 difference-in-difference analysis of the fare effects of the
9 NEA?

10 **A.** I think there's -- we don't know the answer to that,
11 first of all. But second of all, I don't think it's going to
12 be pretty -- it's not going to be easy to do, and that's how
13 I testified.

14 **Q.** Okay. So -- so that's what I thought. So are, then --
15 is the point of your testimony is that -- that you're asking
16 Judge Sorokin to find that there's -- that there's nothing an
17 economist can do now and probably nothing that an economist
18 can do in the future to determine whether the NEA is harming
19 consumers?

20 **A.** No, I disagree with that. I could explain why.

21 **Q.** Well, if we go back to your slide -- actually, go to the
22 next -- I think it's maybe -- slide 30 -- at the bottom left,
23 what you say is, "valid controls may not exist for
24 Professor Carlton, or in the future."

25 I mean, doesn't that mean that you're suggesting

1 that -- that it may never be possible to tell, from an
2 econometric analysis of fares, whether the NEA harms
3 consumers?

4 **A.** That's a more precise question than your first question.
5 And I do have concerns about whether there will exist this
6 claim, before and after, that would allow for an econometric
7 analysis to examine the effect of the NEA on prices or other
8 outcomes.

9 **Q.** So am I correct, then, that what you're fundamentally
10 suggesting by your testimony is we should stop the NEA in its
11 tracks, terminating its consumer benefits, based upon your
12 simulation, because we may never be able to tell whether it
13 harms consumers?

14 **MR. DeRITA:** Objection. That mischaracterizes
15 Dr. Miller's testimony.

16 **MR. WALL:** He's there.

17 **THE COURT:** Overruled.

18 **THE WITNESS:** I don't make recommendations. I just
19 analyze the economics. In this particular instance, I've
20 created -- I've presented a number of evidence -- sources of
21 evidence that illustrate that competition matters and that
22 the NEA aligns the incentives of JetBlue and American.

23 And the way the economics tells us that plays out
24 in the market is often not so favorable for consumers. So
25 that's the foundation of -- that's the economic analysis, as

1 I see it.

2 BY MR. WALL:

3 **Q.** Well, let me go back at this from another perspective.
4 Are you saying that, in almost the 20 months that the NEA
5 partners from -- that the NEA has been in effect, American
6 and JetBlue have not taken any action, potentially
7 anticompetitive, that can be evaluated for actual adverse
8 effects?

9 **A.** I don't know the answer to that question.

10 **Q.** Well, let me give you an example. We've heard a lot in
11 this case about the decision to have American stop flying its
12 metal on Boston-LaGuardia. Do you recall that one?

13 **A.** Not specifically. Oh, I do -- I've -- I remember the
14 contours of it.

15 **Q.** Okay. Are you aware that the Department of Justice and
16 the Department of Transportation were told that that was the
17 clean team recommendation some two years ago in the summer of
18 2020?

19 **A.** No.

20 **Q.** Okay. But are you aware that American Airlines stopped
21 serving that route earlier this year?

22 **A.** No.

23 **Q.** Okay. So, then, I guess this sort of predicts the next
24 answer to the question -- I mean, did you consider the
25 possibility of studying the fares on that route since

1 American's metal went away to see if the outcome was anything
2 like what you're predicting?

3 **A.** No.

4 **Q.** Okay. Robin Hayes testified early in this trial that
5 JetBlue is still charging its same low fares on that route.
6 Do you have any basis for contradicting him?

7 **A.** I'm not even sure the data are available to check. I
8 don't have a basis for suggesting otherwise.

9 **Q.** I want to go to this question about validating your
10 predictions of your simulation. Now, the fact of the matter
11 is, is that you didn't do anything when you put forth your
12 initial report, or your reply report, to validate the
13 predictive power of your merger simulation against any merger
14 benchmarks, correct?

15 **A.** Yeah, I believe that's true.

16 **Q.** Okay. And when you were last here, you offered your
17 slide 66 --

18 MR. WALL: Which if we have that from his
19 demonstratives last time --

20 BY MR. WALL:

21 **Q.** -- claiming that the simulation results were consistent
22 with the JetBlue effect, right?

23 **A.** I don't remember the particular slide.

24 Yes, this one.

25 **Q.** Okay. But as we discussed, the JetBlue effect is not a

1 merger effect, right?

2 **A.** It's not merger.

3 **Q.** Okay. And the professional standards among economists
4 are that, to use a merger simulation, you need to be able to
5 show that the oligopoly model employed explains the past well
6 enough to provide useful predictions of the future, right?

7 **A.** I disagree. But I do think -- there are different ways
8 to validate a model and I could explain that if you like.

9 **Q.** Let me just instead put up what Drs. Greg Werden, Luke
10 Froeb, and David Scheffman -- the latter two being former
11 chiefs of the FTC Bureau of Economics -- Dr. Werden, the long
12 time DOJ economist you mentioned earlier -- wrote in their
13 article about a *Daubert* discipline for merger simulations.

14 And what they state here --

15 MR. WALL: That's not the quote. Sorry. That's
16 the wrong quote. It's above that.

17 We'll put it up here for you, sir.

18 That's not the marginal cost one.

19 BY MR. WALL:

20 **Q.** Okay. Let me just move on from that, because we don't
21 have that and, unfortunately, we don't have time.

22 I want to -- let's talk about your slide 41. Let's
23 put on slide 41 of your presentation this morning.

24 THE COURT: 31?

25 MR. WALL: 41.

1 BY MR. WALL:

2 Q. Okay. So let's just be clear what you've done in this
3 slide 41, is you have an array here, a number of articles and
4 other sources for the average -- the observed average effects
5 of various -- of airline mergers, right?

6 A. Not only airline mergers, but there are some airline
7 mergers on this chart.

8 Q. That's -- that's correct. Okay. The simulation results
9 are on there as well, right?

10 A. As well as the defendants' advocacies, quantification of
11 the JetBlue effect, and my own econometric work.

12 Q. Okay. So the dark blue bars, including the highest one
13 on the left there, that's from that study from Dr. Peters of
14 the early airline mergers in the '80s and '90s, correct?

15 A. That's one of the mergers studied by Dr. Peters, yes.

16 Q. Well, all of the mergers that he studied in that article
17 occurred in the '80s and '90s?

18 A. I'm sorry, I thought you were referring to the single bar
19 that's on the left.

20 Q. But according to the legend, the dark -- the -- the --
21 almost black bar, I suppose it is, is Peters from 2006,
22 right?

23 A. That's one of the mergers he studied, yes.

24 Q. Okay. But his -- his appears more than once on there?

25 A. That's right. He studied five different mergers.

1 **Q.** Yeah. Exactly. Okay. So what I wanted to do here is,
2 we prepared something while you were testifying that modifies
3 this chart a little better. And I'll ask -- put that on.
4 And what we've done here is we've removed the references to
5 Peters from the old mergers, and now what we're left here is
6 the other bars, but also we have added in a dotted red line
7 across the -- the chart, I think 28.7 percent value, which is
8 your estimated average increase on the Boston overlaps when
9 weighted.

10 Do you see that?

11 **A.** I do see the graph.

12 **Q.** Okay. So now, with respect to all of the other bars that
13 are left on this chart, you have -- you have created for
14 the -- for the Boston nonstop overlap routes an average, a
15 weighted average, estimated overcharge that much larger than
16 anything that has been observed in any prior airline merger,
17 regardless of who -- who has studied it, with the sole
18 exception of one entry from Dr. Peters' 2006 article,
19 correct?

20 **A.** Now this is no longer apples to apples. You're selecting
21 a subset of routes where prices are higher and comparing them
22 to an average effect across other articles.

23 As you know, my model predicts a bunch of low
24 numbers as well in New York, and that's part of the
25 average --

1 Q. Excuse me, sir. I was asking you about Boston.

2 Actually, I'll -- go ahead and finish that. Your model has a
3 bunch of low numbers in New York, right?

4 A. Some of the numbers in New York are low.

5 Q. Right.

6 A. It depends on the market.

7 Q. And the value of commerce in New York, because New York
8 is so much bigger, is much larger, right?

9 A. I don't know. I think New York has more commerce than
10 Boston.

11 Q. Right.

12 A. It's not a number that I've looked into.

13 Q. So when you get that average figure that you like to
14 point to, that's being pulled down by the lower estimated
15 increases and the greater volume of commerce in New York
16 relative to Boston, correct?

17 A. I mean, that's what an average is.

18 Q. Of course it is. But if we look at the entire cohort of
19 Boston routes alone, you are getting a weighted average
20 28.7 percent increase in price predicted from the NEA, right?

21 A. Yes.

22 Q. Okay. And that -- that number is multiples of what has
23 ever been found as the actual effect of any consummated
24 airline merger, unless we go back to Dr. Peters' studies of
25 mergers from the last century, right?

1 **A.** I don't think that comparison can be made.

2 **Q.** Is it correct what I said? Yes or no?

3 **A.** Mathematically, the 28.7 is higher than the recent
4 studies of the legacy mergers, as I understand it.

5 **Q.** Okay. And as we discussed last time, if you focus on
6 the -- the literature that is honed in on nonstop overlap
7 routes between hubs, hubs like Boston to Philadelphia or
8 Boston to Dallas, that literature consistently finds that
9 mergers have resulted in lower fares and expanded output,
10 correct?

11 **A.** I think that's a mixed literature, but those are also
12 routes that are affected by divestitures often.

13 **Q.** Well, so are these. You do understand that there were
14 divestitures in New York, right?

15 **A.** There's a limited number of slot divestitures according
16 to the DOT.

17 **Q.** Right. And if we don't meet the growth commitment and we
18 have to -- to divest ten more slots, there will be the same
19 number of slot divestitures in New York as -- from the NEA,
20 as there was in the US-American Airlines merger in New York,
21 correct?

22 **A.** I -- I don't know the details of that merger.

23 **Q.** Okay. I just have one last point that I want to make
24 with you. Did you listen to Dr. Town's testimony?

25 **A.** I was able to listen to most of it, yes.

1 **Q.** Okay. Mr. Schwed asked him about an exercise that
2 Dr. Israel did in response to criticism -- criticism by
3 Dr. Town that -- and what he said is that Dr. Israel had not
4 shown that his consumer benefits estimate was valid for your
5 nested logit model. Do you recall that?

6 **A.** I don't recall it specifically.

7 **Q.** Okay. Well, let me ask you this. Are you familiar with
8 the fact that in a September 6th supplemental submission,
9 Dr. Israel offered an estimate of consumer benefits using
10 your nested logit demand specification that put benefits at
11 almost \$2 billion?

12 **A.** Yes, I'm aware of that.

13 **Q.** Okay. Now, you never replied to that in any subsequent
14 submission or testimony, did you, sir?

15 **A.** No.

16 **Q.** So yesterday, when at page 75 of the afternoon
17 transcript, Dr. Town testified that you had criticized that
18 work by Dr. Israel, he certainly wasn't referring to anything
19 in your reports or any testimony you gave, was he?

20 **A.** I think he was referring to --

21 **Q.** Yes -- can you just answer my question yes or no? He
22 wasn't referring to anything in any reports or testimony that
23 you gave in this case, correct?

24 **A.** I believe that's --

25 MR. DeRITA: Objection. He can't answer what

1 Dr. Town is referring to.

2 THE COURT: He's not asking what Dr. Town's
3 referring to. He's asking whether he could have relied on
4 anything he, Dr. Miller, testified to or wrote in his
5 reports. That, he could answer, I think.

6 MR. DOIDGE: Your Honor, just so I'm clear I
7 understand, Dr. Miller discusses Dr. Israel's attempt to
8 use --

9 MR. WALL: Excuse me, sir. You do not get to give
10 the answer.

11 THE COURT: I don't think the question is --

12 MR. DOIDGE: You were making a representation. I'm
13 allowed to object to the representation.

14 THE COURT: The representation of --

15 Well, what's the question again, Mr. Wall?

16 BY MR. WALL:

17 **Q.** The question is, is -- when Dr. Town testified yesterday
18 that you had criticized Dr. Israel's estimate of consumer
19 benefits based upon your nested logit demand specification,
20 he couldn't have been referring to anything you had put into
21 your reports or your testimony in this case, yes or no?

22 **A.** I could clarify.

23 THE COURT: Forget about whether Dr. Israel
24 testified to that or not, because that's what there might be
25 a dispute, the representation, but as to whether or not you

1 put that in your report or your testimony.

2 THE WITNESS: There's some confusion that I could
3 clear up if you'd like me to.

4 BY MR. WALL:

5 Q. Can you please just answer the question?

6 THE COURT: Just the question.

7 THE WITNESS: Okay. So the question is did I reply
8 to the consumer benefits of analysis that Dr. -- because he
9 did two.

10 BY MR. WALL:

11 Q. In his September 6th supplemental report --

12 A. The September 6th supplement, I did not reply to.

13 MR. WALL: Thank you, sir.

14 No further questions.

15 THE COURT: Any redirect?

16 MR. DeRITA: Yes, Your Honor.

17 **REDIRECT EXAMINATION BY COUNSEL FOR PLAINTIFFS**

18 BY MR. DeRITA:

19 Q. Dr. Miller, Mr. Wall had asked you some questions about
20 mechanisms that may or may not be in your model that reflect
21 your findings of harm and specifically was talking about
22 whether capacity was in your model.

23 Do you have anything to add to your explanation of
24 answers you gave regarding that?

25 MR. WALL: I object to the form of that question.

1 The question "Do you have anything to add?" is too vague.

2 THE COURT: Sustained as to the form.

3 BY MR. DeRITA:

4 Q. Does -- is capacity reflected in your model somehow?

5 A. The model holds capacity fixed as of 2019, and I'm
6 analyzing the pricing incentives along the routes as they
7 exist then.

8 Q. There was some discussion about the hypothetical
9 monopolist test and the proposition as to whether every
10 combination of airports in New York would -- and Newark --
11 would pass the hypothetical monopolist test.

12 What's the -- what's the relevance of multiple
13 combinations of airports passing the hypothetical monopolist
14 test?

15 A. Yeah, this is something that we talked about on direct,
16 is that the guidelines acknowledge that sometimes you can
17 have multiple combinations.

18 In fact, if a subset -- suppose JFK/LaGuardia --
19 market power matters there. And then we want to ask again,
20 would market power, you know, be important if we also add
21 Newark, the answer is always going to be yes, you know, given
22 that a subset -- you know, you've got -- you've got -- a loss
23 of competition matters for consumers. Like, adding even more
24 loss of competition, you're still going to find it.

25 So the guidelines at that point tell you to focus

1 in on the competition between the merging parties -- okay? --
2 merger because it is in the merger guidelines here. It would
3 be, you know, JetBlue and American in our particular
4 instance. And to define the market that captures their
5 competition, so that's JFK and LaGuardia when we're talking
6 about New York.

7 And then the guidelines instruct us or recommend
8 that you don't go further if you're just adding in distant
9 substitutes. Okay? So if JFK/LaGuardia passed the
10 hypothetical monopolist test, we don't need to go further if
11 we've got the competition reasonably captured and what we're
12 essentially doing is bringing a distant substitute in Newark.

13 And that's an empirical question, is Newark a
14 distant substitute? But that's what I've tried to provide
15 evidence to answer.

16 **Q.** Let's talk about entry and repositioning. You mentioned
17 that you had done some route-level analysis but didn't, I
18 think, get to fully explain your answer. How does your
19 analysis of entry and repositioning relate to route-level
20 entry and repositioning?

21 **A.** Well, the -- take a -- let's take a step back. You know,
22 what do we have in the model? And what do we think about the
23 economics of this? You know, one of the big beneficiaries of
24 JetBlue and American being able to exercise more market power
25 on the -- along the routes are its competitors.

1 In other words, take a route where Delta flies as
2 another option. Delta is one of the biggest competitors --
3 excuse me -- beneficiaries of the NEA. And the reason is
4 that, as prices go up, customers -- some customers don't want
5 to pay the higher prices and they look for alternatives. And
6 some of those will find other alternatives in products like a
7 product that Delta might offer.

8 And so the economics indicate that Delta now has --
9 has some choices. You know, it could maintain its prices and
10 just sell more product, and that's a good thing; or it could
11 raise its prices and still sell more product, and that's an
12 even better thing. And -- and the model implements that.

13 And so the model allows for Delta or any other
14 competitor on the route to expand what -- to expand the
15 number of tickets it sells, to be the beneficiary of the NEA
16 along the lines of what economic theory would predict.

17 And so, for example, in Charlotte and Boston, for
18 example, the share of Delta, I believe, roughly doubles.
19 Okay? And this is a connect product in the context of 2019,
20 so that traffic is accommodated through a number of different
21 hubs. It's not hard to double traffic, but Delta gains a
22 lot.

23 Now, there's a different question, which is does it
24 make sense for Delta then to make subsequent investments into
25 that market? And that's -- you know, there's not an obvious

1 answer to that. There are certainly trade-offs, that if
2 Delta wants to relocate a plane, it's got to take the plane
3 from somewhere else. And that sort of trade-off makes me
4 think that it's unlikely to happen at the level that would
5 substantially mitigate the effects.

6 And I've got a paper -- I've got a research paper
7 on this. It looks at how strong that incentive is, and it's
8 a lot weaker than some folks might think it is. It's not a
9 huge incentive to reposition in. There's not a lot of extra
10 profitability for doing so above and beyond the benefit that
11 Delta already obtains. And then putting that together with
12 the frictions that I've identified, I don't see a reason
13 that -- that reposition can just be assumed to solve all the
14 problems here.

15 **Q.** You were asked some questions about whether you account
16 for any additional frequencies that might be added through
17 the NEA. Can you explain whether your analysis accounts for
18 that?

19 **A.** I can. And -- and I think some clarification, maybe, is
20 appropriate here. The assertion, I believe, that Dr. Israel
21 makes in the context of his report -- but he didn't testify
22 to this, at least directly -- is that -- is that putting the
23 schedules of JetBlue and American together creates more
24 options for consumers.

25 But it's not quite the right interpretation because

1 consumers could have picked any of these flights initially,
2 and they can pick any of those flights afterwards. And so
3 the real question is sort of what sort of incremental benefit
4 do customers get from being able to buy a JetBlue flight
5 through the American website or vice versa?

6 And that's an empirical question. There are
7 reasons that folks might have that you're reluctant to buy
8 JetBlue from American for a variety of reasons. Maybe
9 customer service isn't as good. That's not particularly
10 report. Professor Town highlights a bunch of those in his
11 report. But there's research on it. That's one important
12 point.

13 And Dr. Israel, in his own analysis, his own
14 research paper, concludes that customers just don't know
15 value frequencies offered by a codeshare partner in the same
16 way that they value buying an American ticket on American.

17 And that makes sense because someone who will buys
18 an American ticket is probably doing it because they want an
19 American flight. That's sort of why they're doing it. So
20 the extra option to buy on JetBlue just, by definition, just
21 isn't going to matter as much.

22 So in thinking about that, I pushed it further, and
23 I looked at the frequencies in which you actually have this
24 sort of thing where a carrier buys sort of, you know, JetBlue
25 on American. Okay? But first I looked at the West Coast

1 alliance between -- it was maybe a joint venture. There's
2 not too many instances in data where you can get a good sense
3 for this.

4 But I looked at American and Alaska first, and I
5 just looked to see how often do they -- how often do
6 consumers choose though codeshare flights compared to what
7 Dr. Israel puts into his report, which is that they're just
8 completely indifferent.

9 And the answer is that -- is that consumers don't
10 like to buy codeshare flights where it's, you know, American
11 and then on to JetBlue. Like, they just -- it turns out, you
12 look at the data, it doesn't happen all that often, much less
13 than Israel represents -- Dr. Israel represents.

14 Then I updated that analysis to look at the -- the
15 NEA along routes where -- where these sort of codesharing
16 options were available in both directions, so you could buy
17 American on JetBlue and JetBlue on American; and I found the
18 same thing, that just the fact of the matter is folks tend to
19 buy -- from American.com, they buy an American flight; and
20 from JetBlue.com, they fly a JetBlue flight. And that's just
21 what shows up in the data.

22 And, you know, I -- I could have presented this
23 initially; but, actually, Dr. Israel didn't even testify to
24 this analysis. And so, you know, going to great lengths to
25 rebut it and show why it didn't make sense is, you know, not

1 something that I took pains to do until it came up on cross
2 here.

3 **Q.** You were asked a hypothetical by Mr. Wall that related to
4 an assumption that JetBlue would add business passengers on
5 JFK and LaGuardia. Do you remember that hypothetical? It
6 was -- it was shown during a Delta document, while a Delta
7 document was on screen.

8 **A.** I'm sorry. I don't remember the detail of the
9 question -- the details of the question.

10 **Q.** Maybe the next question will get you there. In
11 discussing the hypothetical, there -- was there any -- was
12 there a question about what the net effect of JetBlue adding
13 new business routes for J- -- or new business passengers for
14 JFK/LaGuardia would be?

15 **A.** Oh, yeah, I can try to clarify this. And it's something
16 that Professor Town has talked about in great length, and so
17 maybe I can just point to some of the things that he said.

18 But, you know, if -- if what this is, is simply
19 JetBlue replacing an American flight, it's not clear there's
20 net growth; or if it's the case that, you know, JetBlue comes
21 in with a bigger plane than American, it's not necessarily
22 the case that American might not have expanded in the future
23 on its own.

24 And so that's sort of a question of what the
25 but-for world is, is sort of central to understanding what

1 the net benefit is. And -- and that's what I was -- I was
2 attempting to clarify. But on these efficiencies questions,
3 these are things that Professor Town has addressed in detail
4 to a greater degree than I have.

5 **Q.** Shifting to the difference-in-differences discussion,
6 Mr. Wall had asked you about whether you had done any work to
7 identify control groups, and you said that you hadn't. Why
8 did you not do that?

9 **A.** Why -- I anticipate all the problems that showed up in
10 Professor Carlton's analysis, and in addition to other
11 problems that I explained. And, you know, when it comes down
12 to it, we can look at Boston and ask the question whether
13 there are going to be control routes that make sense here,
14 and we just answered that pretty much straightaway, because
15 the nonstop overlap routes, for the most part, they go to
16 American hubs, and these are sort of a specific set of
17 cities.

18 The other routes go -- JetBlue flies them nonstop.
19 American doesn't. They go to different destinations, so
20 right away, you just have a very different sort of location,
21 a type of customer that's going to be attracted by these --
22 by the offerings. You have a different degree of
23 competition. And all of that makes it -- makes me have
24 serious concerns about whether it's possible to identify a
25 set of controls that's going to respond to external stimuli

1 like demand changes or cost changes or COVID-19 in the same
2 way that the treated routes would.

3 So this is one of the concerns that I had about
4 the -- the feasibility of gaining insight; and, really, all
5 that played out in Professor Carlton's analysis.

6 **Q.** So I want to ask you about a slide that you were shown by
7 defendants. It was a demonstrative they just created within
8 the last hour. I don't have a copy of it.

9 MR. DeRITA: Do you mind putting it up? It was the
10 slide 41 variant that you have, without Peters, with the red
11 bar across the top?

12 Yeah, that's it.

13 BY MR. DeRITA:

14 **Q.** Dr. Miller, you had mentioned that this slide is not an
15 apples-to-apples comparison. Why is that?

16 **A.** Well, it's just -- it's really selective in a lot of
17 ways. I mean, for one, they took off the merger that
18 actually gets to that level. Second, they're looking at a
19 subset of routes. I mean, they didn't, you know, have to
20 stop at Boston. They could have said we're going to look at
21 a subset of the routes that generate even higher price
22 effects.

23 You know, so the notion that you can go to 28.7 to
24 say, well, what about this number, you know, they can put any
25 number they want up there. Some of these aren't likely to

1 manifest even as pricing increases.

2 As I was testifying before, you know, some of the
3 larger price increases are likely to be sort of one carrier
4 ceding a route to the other carrier, and that's going to
5 generate -- you don't see the 150 in the data. I just don't
6 understand how the 28.7 is compared to the average effect of
7 other things. It's not even my average.

8 So I -- that's -- that's -- that's, you know, one
9 observation. The other observation is it's not even that far
10 even if you took it for a given -- it's not that far from the
11 defendant advocacy where -- quantification of the JetBlue
12 Effect.

13 And then, with respect to the legacy mergers, these
14 are events that I really don't think are all that comparable.
15 So -- and even some of those are generating price effects, on
16 average, that are, you know, look like more than half of the
17 9 percent. So what we learned from the legacy nonstop -- the
18 legacy mergers at the end of the -- you know, in the recent
19 history, I think is not very much, but I don't know. I just
20 look at this chart and I see a lot of things that are sort of
21 meant to convey a certain impression that doesn't make a lot
22 of sense to me.

23 **Q.** You were asked about a September 9th submission by
24 Dr. Israel attempting to use your model to estimate consumer
25 benefits. Are you aware of whether Dr. Israel submitted

1 anything else before that, attempting to also use your model
2 to look at consumer benefits?

3 **A.** This is the other exercise, I believe, that Dr. Israel
4 submitted about putting frequencies together, and he didn't
5 testify to that, to my understanding. And -- but I responded
6 to that exercise in full in my reply report, including the
7 description of the data analysis that I gave a moment ago.

8 **Q.** How did you respond to that?

9 **A.** Well, it really has, I believe, if I'm remembering, a
10 three-part response. It points out that there are reasons to
11 think that -- I've already given it -- the reasons to think
12 that, you know, someone buys, on JetBlue, an American flight,
13 that that's not as much value. They had already had these
14 options available. Israel, himself, recognizes they're not
15 as good in his research, and you look in the data, and sure
16 enough, our estimates suggest that it's just -- you know,
17 this is an inconsequential benefit to -- as Dr. Israel has
18 attempted to quantify it.

19 MR. DeRITA: I have nothing further. I'll pass the
20 witness. Thank you, Your Honor.

21 THE COURT: All right.

22 MR. WALL: Just a few.

23 **RECROSS-EXAMINATION BY COUNSEL FOR AMERICAN AIRLINES**

24 BY MR. WALL:

25 **Q.** First of all, what you actually said in your reply report

1 was that you thought that codesharing alone was much less
2 valuable than another flight on the marketing carrier, right?

3 **A.** I did multiple things, including looking at the NEA
4 specifically, so --

5 **Q.** Yeah. And -- but you could -- you put a number on that,
6 and you said it was about 25 percent is valuable as another
7 flight on the operating carrier, right?

8 **A.** No, I don't think that's -- that's the words that I would
9 have used for that. I could clarify, if you like.

10 **Q.** Okay. Let me just move on to a couple of other things.
11 Did you see any evidence in your review of this case that
12 Delta Air Lines thought the Northeast Alliance was good for
13 Delta?

14 **A.** I've looked at a lot of documents. I may have seen one
15 that is like that, but I don't have particular memories of
16 specific documents.

17 **Q.** You've seen a lot of documents from Delta talking about
18 the threat that the NEA poses to it, right?

19 **A.** I've seen a lot of documents. I don't want to represent
20 that I've seen documents that say a particular thing on this.

21 **Q.** I mean --

22 **A.** Do you have something you'd like me to look at?

23 **Q.** We don't really have the time. I wish we did. But let
24 me just ask you, sir -- is it your impression that the weight
25 of the evidence in this case is that Delta Air Lines thought

1 that the NEA was a good thing for it?

2 **A.** I don't want to characterize what Delta says, thinks. I
3 can characterize the economics.

4 **Q.** And if they have a different point of view than what you
5 come to through your evaluation of the economics, would you
6 just say that they're just -- they don't understand and
7 they're getting it wrong?

8 **A.** I'd have a lot of questions. I'd be curious and maybe we
9 would all learn something.

10 **Q.** Have you made any effort at all in this case to study the
11 competitive reactions of Delta or other airlines to the NEA?

12 **A.** Yes, I have.

13 **Q.** And have you seen that, in fact, Delta Air Lines has
14 taken actions that can be reasonably viewed as a response to
15 the NEA? For example, announcing service between Boston and
16 Charlotte?

17 **A.** No. To the contrary, my report provides some evidence
18 that Delta has not responded by adjusting its schedules or
19 its -- or its routes in response to the NEA. And I believe
20 the reply report also shows support for the same with United.

21 **Q.** Have you seen any evidence that Delta or United have
22 begun to restrict their capacity in the Northeast as a result
23 of the NEA?

24 **A.** No, I have not seen that evidence.

25 **Q.** In fact, you've seen plenty of evidence that both United

1 and Delta are expanding output and capacity in the NEA
2 territories since the NEA was announced, correct?

3 **A.** I -- this isn't something that I've looked into. I think
4 other people could probably speak to this more than me.

5 **Q.** The last point I want to talk to you about is about this
6 recurring issue of robbing Peter to pay Paul. First of all,
7 your model doesn't actually predict whether there is any
8 phenomenon of -- of funding or robbing Peter to pay Paul,
9 does it?

10 MR. DeRITA: Objection. This -- "robbing Peter to
11 pay Paul" exceeds the scope of his testimony today.

12 MR. WALL: No, it doesn't. It has to do with the
13 treatment of capacity.

14 THE COURT: What does it have to do with the
15 treatment of capacity?

16 MR. WALL: He just testified on redirect about the
17 treatment of capacity in his model.

18 THE COURT: Oh, yes. So that, you can ask him
19 about.

20 BY MR. WALL:

21 **Q.** And so let me just be clear. You're just -- when you
22 talk about the possibility of funding and things like that
23 offsetting the capacity gains of the NEA, you're just making
24 an assumption that in some sort of Newtonian way, for every
25 consumer benefit from growth in one region, there must be an

1 equal and opposite consumer harm from retraction somewhere
2 else, right?

3 **A.** Wrong.

4 **Q.** You haven't studied whether there's actually been any
5 consumer harm in any part of the country from which the
6 aircraft have come in order to -- to serve the NEA regions,
7 have you?

8 **A.** I don't think I've analyzed that question at all.

9 **Q.** Exactly. One could do that. One could identify the
10 market from which an aircraft came and try to determine
11 whether there was an adverse effect on fares in such a
12 market, right?

13 **A.** I don't see how that's relevant for my analysis.

14 **Q.** I didn't ask you that. One could do that, correct?

15 **A.** I don't know.

16 **Q.** But you haven't, right?

17 **A.** I have not.

18 MR. WALL: Thank you, sir.

19 THE COURT: All right. You're excused. Thank you
20 very much.

21 Is that it?

22 MR. JONES: Your Honor, I'm going to ask Mr. Moore
23 to come up. We do have a couple of document issues --

24 THE COURT: All right.

25 MR. JONES: -- to address.

1 THE COURT: No more witnesses?

2 MR. JONES: No more witnesses, Your Honor.

3 MR. WALL: I'm also told there's some deposition
4 designation issues we need to deal with.

5 MR. MOORE: Yes, unfortunately, I'm not here to
6 cross, Mr. Wall. Just some housekeeping matters.

7 MR. WALL: The offer still stands.

8 MR. MOORE: So we have a few supplemental exhibits
9 that are unobjected to by defendants that we want to move
10 into evidence. We have a list --

11 THE COURT: Fine. I'll take that list.

12 So just so the record is clear, Ms. Belmont has a
13 copy, and we'll admit into evidence all of the -- there's no
14 objection by Mr. Wall to these?

15 MR. WALL: No.

16 THE COURT: Okay. So this two-page list of
17 exhibits starting with PX-461, and the last entry is PX-1155,
18 are admitted into evidence without objection.

19 (Plaintiffs' Exhibits as stated on the two-page
20 list, beginning with PX-461 and ending with
21 PX-15155 admitted into evidence.)

22 MS. TAVERNIA: Your Honor, I think that list is not
23 consecutive, though.

24 THE COURT: No, it's not consecutive. I'm just,
25 for identification purposes -- thank you for that

1 clarification -- listing the first and last one.

2 Anything else for you, Mr. Moore?

3 MR. MOORE: A couple of other things. So the Court
4 asked earlier in the trial for a list of the deposition
5 excerpts that were admitted during our examinations for
6 impeachment, so we have a hard copy list of that.

7 THE COURT: Oh, okay.

8 MR. JONES: Impeachment or, Your Honor, just
9 admissions as party opponent, most of them were in that
10 latter category.

11 THE COURT: All right. You gave a copy to the
12 defendants?

13 MS. TAVERNIA: We have an electronic copy.

14 THE COURT: Fine. Okay. It might be helpful to
15 e-mail Ms. Belmont an electronic copy of this, too, so we
16 have it electronically.

17 All right. What else?

18 MR. MOORE: So we have a thumb drive that's the new
19 exhibits that have come in since the trial started. There's
20 been some exhibits that have been added, so we have an
21 electronic copy of that.

22 THE COURT: Okay. I'll take that.

23 MR. MOORE: And then the last thing actually
24 relates to an earlier point. We have a thumb drive that has
25 the demonstratives --

1 THE COURT: I'm going to get impeached for plugging
2 these thumb drives into the judiciary network.

3 MR. MOORE: So you mentioned the deposition and an
4 electronic copy of the excerpts. We'll -- that will be on
5 the thumb drive that we'll have tomorrow as well as some of
6 the demonstratives that have come up during trial. But I can
7 coordinate with Ms. Belmont.

8 THE COURT: Just coordinate with Ms. Belmont.
9 That's fine. Okay.

10 MR. MOORE: And that is it.

11 THE COURT: All right. And then what do you have?

12 MS. TAVERNIA: Just a couple of things. So we will
13 also be providing on a thumb drive to the Court with the
14 additional exhibits and some of the confidentiality changes,
15 but it's not here yet, so if --

16 THE COURT: That's fine. As long as you coordinate
17 with Ms. Belmont, that's totally fine.

18 MS. TAVERNIA: And the other issue is deposition
19 designations. At the outset of the case, we entered a number
20 of them into the record, and there were some more for
21 witnesses who were -- who were on the witness list and were
22 subsequently not called to testify. And so we have agreed
23 with the plaintiffs. It's a set of four, so we can provide
24 those to the Court as well.

25 THE COURT: Perfect. All right. Anything else?

1 MS. TAVERNIA: No. Can I bring them up?

2 THE COURT: Of course.

3 Tomorrow -- or the later thumb drive will have all
4 of this electronically as well, right?

5 MS. TAVERNIA: We -- these were not on the thumb
6 drive, but we can provide an electronic set of all of the
7 deposition designations as well.

8 THE COURT: I think that would be helpful.

9 MS. TAVERNIA: Okay. That's no problem.

10 MR. JONES: Your Honor, one last very quick thing
11 from us, which is just to thank Your Honor and Your Honor's
12 team for the time and attention to this matter and thank
13 Your Honor for you're your Honor's patience and forbearance
14 as well.

15 MR. WALL: We join in that, Your Honor.
16 Your Honor, you've been extremely gracious to us, and we all
17 appreciate it.

18 I also want to just take this opportunity again to
19 give my thanks to the public servants on the left. I'm an
20 alum of the antitrust division. I still think it's the best
21 agency, and I honor your work.

22 Thank you.

23 MR. SCHWED: Thank you, Your Honor.

24 THE COURT: All right. Well, so thank all of you.
25 You've done -- I appreciate it. It's -- sometimes there's a

1 reason that the word "trial" is sometimes used in a context
2 other than things that happen in the courtroom.

3 And so -- but, honestly, you know, in what is a --
4 which has -- a case which has the features potentially of
5 what I have learned, sometimes painfully, certain attributes
6 that sometimes lead to a very disagreeable experience, which
7 is a case which is very much is at stake and in which the
8 lawyers on this side are from different cities and thus might
9 not -- and not from here -- not that there's something
10 special here, but meaning that they won't likely be in front
11 of me again. So there's no repeat player effect that curves
12 behavior.

13 And maybe here you aren't quite in the situation to
14 never deal with each other, but sometimes that leads to very
15 unpleasant outcomes where people can't agree on anything at
16 all, even, like, whether it's a direct examination or who
17 called the witness or, like, things that are beyond
18 comprehension.

19 So, anyway, none of that's happened here. You
20 really worked very hard, I know, to, first of all, just
21 eliminate lots of objections and issues and resolve things
22 and work cooperatively with each other under the
23 circumstances.

24 And that makes it, like -- well, that's really
25 helpful. It's helpful for me because there's just a limit to

1 how many -- you just can't possibly bring every conceivable
2 thing that you -- that the 40 or 80 or however many there are
3 of you could dispute to me to resolve. It's just not
4 possible, and so I appreciate that.

5 And that also helps focus the whole case and focus
6 for me on what are the real merits and what are the real
7 issues and what's, you know, substantially in dispute? So I
8 appreciate that very much.

9 I can't say -- as much as I have enjoyed this, and
10 I find it fascinating in many respects, I can't say that I'm
11 sorry I won't be seeing you tomorrow morning. I just want to
12 be perfectly honest. I mean, I have enjoyed seeing all of
13 you, but it -- it's been awhile.

14 And so in terms -- so I wish you all good luck as
15 you go forward, but in terms of the last little wrinkle, you
16 had agreed on a date, I think, of the 9th, if I remember
17 right, but I could be wrong, a date for posttrial briefs. If
18 you want more because we've gone longer, I don't -- that's
19 fine, and you could -- if you want to push it out a little
20 bit, if you want to keep to that date, I mean --

21 MR. WALL: I think our date was actually a --

22 MR. JONES: It was a flowing date. It was three
23 weeks. It would be three weeks from today.

24 THE COURT: That's fine. I'm not, like, rushing
25 you on that.

1 MR. WALL: Yeah.

2 THE COURT: And so that's fine. So I will just --
3 I mean, I'll be looking at things, but I'll be -- I'll wait
4 for that, probably, to some degree.

5 And you'll hear from me. I mean, to be honest with
6 you, my view of -- my -- you'll hear from me in terms of a
7 hearing on it when I'm ready. And when I'm ready will be
8 when I have digested not only all the testimony, but the
9 exhibits and the documents and particularly your posttrial
10 briefs.

11 I know, just to confirm, you'll be submitting them
12 not only electronically, but hyper would be very helpful,
13 especially to link to the exhibits, even if you to give me a
14 new thumb drive that has all the exhibits and the posttrial
15 briefs, but something so we can click on it, and that would
16 be really helpful.

17 MR. WALL: Right.

18 THE COURT: And so when that -- and, you know --
19 and I'll tell you what I tell everyone, which is, like, I
20 would hope -- like, my goal is to resolve it really fast. I
21 know that it's really significant for all of you, and time
22 is, to some degree, of the essence.

23 I mean, you did this in a year from complaint to
24 now, which is fast. I mean, I get lots of lawyers
25 complaining to me in garden variety cases that aren't nearly

1 the size and complexity of this when I want them to get to
2 file the summary judgment motion within a year of the -- so I
3 know that it's been -- or, you know, a Herculean task for all
4 of you, and not only the last three or four weeks, but the
5 entire year leading up to here.

6 And so I very much intend to try to do it as
7 quickly as I can. I can't tell you how fast or slow or in
8 between that will be. I just don't know. But I won't want
9 to have the hearing until I've pretty much figured that all
10 out so I can honestly make profitable use of my time with you
11 and have useful questions to ask.

12 So it is something that, you know, I can't put --
13 I'm not going to just put it in the queue at -- like, from --
14 with all the other things. It's a significant case. So
15 beyond that, I don't have any more predictions.

16 MR. WALL: Thank you, Your Honor.

17 MR. JONES: Your Honor, if I may, has Your Honor
18 given any additional thought to a time for closing?

19 THE COURT: So here's the practical reality in
20 terms of that. I can't -- I'm literally -- I'm going from
21 this -- I have a pretrial conference in a criminal trial that
22 starts on Monday with, you know, a fair stack of motions that
23 I have to go through and resolve.

24 So there's no way, until I'm past that, I can see
25 you. I just don't have any time in my schedule between the

1 trial and other hearings that are hearings that I can't
2 fairly move. So, I mean, that's not a super long trial. I
3 think it will be over sometime between Thursday next week and
4 Tuesday the following week.

5 MR. WALL: Your Honor, I was going to just make a
6 suggestion on this, because something occurred to me from a
7 prior case, a merger case I handled where the district judge
8 had the closing arguments later and allowed people to give
9 sort of a closing argument, but had issued a number of
10 questions in advance and basically said, "Work them into your
11 closing," so that it -- it's --

12 THE COURT: So I'm perfectly happy to do that. The
13 idea of an iterative process is, like, the way I view the
14 whole process anyways, so I like that idea. And it lets you
15 be prepared, as opposed to blindsided by my questions --

16 MR. WALL: Right.

17 THE COURT: -- and -- at a hearing, which is --
18 probably get better answers. And so I'm open to that.

19 You know, I'm open to the possibility of giving you
20 a closing argument time, like, something in the vein of two
21 to three weeks from now when I'm past this other trial -- and
22 so that -- I just -- as a practical -- so if that's what you
23 want, I will think about that. And I guess what I'd say is
24 I'll get back to you in a couple of days, and I'll propose --
25 and -- if that's what you want.

1 MR. JONES: That is what we would prefer,
2 Your Honor.

3 THE COURT: Okay. So then let me think about it a
4 little bit, and I'll get back to you in a couple of days.
5 And what I'll do is probably issue a time for it.

6 And what I'll say to you about the time is, when I
7 issue -- and so I'll block out a morning, basically, or an
8 afternoon. You don't have to view the time as the tablets.
9 I mean, like, if it doesn't work, you can work with each
10 other. You can work with Ms. Belmont.

11 I'm just -- I'm just starting -- I'm just saying,
12 well, this is when, and then you can -- if you want a
13 different time, just talk to the other side and talk to
14 Ms. Belmont if that time is no good because of whatever, and
15 I'll let you -- sort of the three of you work that out.

16 MR. WALL: I just note I have a conflict on
17 November 10th and 11th. So if that could be avoided, that
18 would --

19 THE COURT: It definitely won't be on
20 November 11th.

21 MR. WALL: That's true. I guess that's right.

22 THE COURT: Yeah. So -- and I'm happy -- like, if
23 I had issued November 10th and it's a conflict for you, it's
24 fine. Don't -- you know, you can talk to the other side,
25 talk to Ms. Belmont, and work out a different date.

1 MR. WALL: Thank you, Your Honor. I appreciate it.

2 THE COURT: That's fine.

3 I think the only other thing that -- do either of
4 you have anything else?

5 MR. JONES: Not for plaintiffs, Your Honor.

6 MR. WALL: No.

7 MR. SCHWED: No. No, Your Honor.

8 THE COURT: Then, the only other thing I just say
9 now -- it's not about the merits at all -- but I know that --
10 I really know a lot of heart and soul and effort and sweat
11 and pain went into this whole year and -- for all of you,
12 including the last four weeks, and none of you are from here,
13 so it's a lot easier for me to come here every day than for
14 all of you. So I do appreciate that.

15 But, also, I know that each of you, to the extent
16 you thought reasonably possible under the circumstances, gave
17 people with less experience, whatever that means in the
18 relative dimensions, the opportunity to participate. And I
19 appreciate and commend you for that, because I do think that
20 there's one trend I don't need an economist to tell me about,
21 which is that the opportunity for lawyers to speak in court
22 is declining, especially precipitously for people with less
23 than 5, 10, even 15 or sometimes 20 years of experience, but
24 certainly 5 or 10 years. And it's the nature of lots of
25 different things going on.

1 So to the extent you did that, I appreciate it. I
2 mean, it doesn't change the outcome, but it is something I
3 note and I commend you for because that's how -- it's just, I
4 think, important for the profession, and as a whole, it's
5 important for the individual people's development. And it's
6 probably good for the Court too. That's less clear.

7 Anyway, so thanks a lot, and I'll see you in a few
8 weeks.

9 (Court in recess at 12:51 p.m.)
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C E R T I F I C A T I O N

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter to the best of my skill and ability.

/s/ Rachel M. Lopez

October 27, 2022

/s/ Robert W. Paschal

Rachel M. Lopez, CRR

Date

Robert W. Paschal, RMR, CRR

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